S. HRG. 99-259

CRIME OF GENOCIDE

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

MARCH 5, 1985

Printed for the use of the Committee on Foreign Relations

U.S. GOVERNMENT PRINTING OFFICE

47-614 O WASHINGTON : 1985

S381-2

COMMITTEE ON FOREIGN RELATIONS

RICHARD G. LUGAR, Indiana, *Chairman*

JESSE HELMS, North Carolina	CLAIBORNE PELL, Rhode Island
CHARLES McC. MATHIAS, Jr., Maryland	JOSEPH R. BIDEN, Jr., Delaware
NANCY L. KASSEBAUM, Kansas	PAUL S. SARBANES, Maryland
RUDY BOSCHWITZ, Minnesota	EDWARD ZORINSKY, Nebraska
LARRY PRESSLER, South Dakota	ALAN CRANSTON, California
FRANK H. MURKOWSKI, Alaska	CHRISTOPHER J. DODD, Connecticut
PAUL S. TRIBLE, Jr., Virginia	THOMAS F. EAGLETON, Missouri
DANIEL J. EVANS, Washington	JOHN F. KERRY, Massachusetts

JEFFREY T. BERGNER, *Staff Director*
GERYLD B. CHRISTIANSON, *Minority Staff Director*

CONTENTS

	Page
Hearing days:	
March 5, 1985	1
Statements of:	
Abrams, Hon. Elliott, Assistant Secretary for Human Rights and Humanitarian Affairs, Department of State	4
Friedlander, Robert A., professor of law, Pettit College of Law, Ohio Northern University, Ada, OH	71
Katson, Trisha, legislative director, Liberty Lobby, Washington, DC	115
Moore, John Norton, Walter Brown, professor of law, University of Virginia, Charlottesville, VA	80
Phillips, Howard, Conservative Caucus, Vienna, VA	106
Rees, Grover, III, professor, University of Texas Law School, Austin, TX	55
Robinson, Davis R., legal adviser, Department of State	7
Schlafly, Phyllis, Eagle Forum, Washington, DC	101
Shepherd, John C., president, American Bar Association, accompanied by John Norton Moore, chairman, Standing Committee on Law and the National Security, the American Bar Association, and Walter Brown, professor of law, University of Virginia Law School, Charlottesville, VA	50
Shidler, Iris L., State Chairman of Women, Central Committee of American Independent Party, National Affiliate, Populist Party, Rialto, CA	112
Tarr, Ralph W., Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice	5
Wiesel, Hon. Elie, professor, Boston University	86
Insertions for the record:	
Helms Substitute for the Resolution of Ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide	14
Situations where inflicting mental harm would be an offense under the Genocide Convention	31
Action taken by the Soviet Union, Eastern bloc countries, and Yugoslavia on legislation implementing the Genocide Convention	35
Excerpt from the Senate Foreign Relations Committee Hearing on the Genocide Convention, 98th Congress, 2d session, September 12, 1984, S. Hrg. 98-962	47
Prepared statement of Grover Rees III	60
On the Prevention of Violence, by Robert A. Friedlander, from the Catholic Lawyer, vol. 25, No. 2, Spring 1980	73
Letter to Senator Lugar, from Senator Dodd, dated February 20, 1985 regarding Mr. Wiesel's appearance at the March 5 hearing	98
Excerpt from Committee on Foreign Relations Business Meeting, September 19, 1984	99
Resolution urging the Senate to act on the Genocide Convention prior to adjournment	100
Executive Resolution expressing the sense of the Senate in support of the principles contained in the Convention against Genocide	100
Rollcall vote on S. Res. 478, from the Congressional Record, October 11, 1984	100
Article-by-article explanation of the Genocide Treaty	105
Prepared statement of Trisha Katson (with attachments)	119
State and Justice Department's responses to additional questions submitted for the record	166
State Department's responses to additional questions submitted by Senator Lugar	179
State and Justice Department's responses to additional questions submitted by Senator Pell	182

S 381-2

Insertions for the record—Continued Page
State and Justice Department's response to an additional question submitted by Senator Dodd 184
State and Justice Department's responses to additional questions submitted by Senator Kerry 185

APPENDIX

Letters to Senator Lugar from:
Deukmejian, George, Governor, State of California, dated March 8, 1985 ... 189
Goldberg, Arthur J., dated February 28, 1985 189
Levine, Jacqueline K., Chair, National Jewish Community Relations Advisory Council, New York, NY, dated March 4, 1985 190
Statement of the American Jewish Committee and Anti-Defamation League of B'nai B'rith 190
Statement of the American Jewish Congress 191
Statement of Gerald Kraft, president, B'nai B'rith 192
Statement of David R. Hawk 194
Statement of the American National Committee of America 199
Statement of Ross Vartian, executive director, Armenian Assembly of America 200
The Armenian Case, from Senator Helms' "Additional Views," September 24, 1984 202
Letter to Senator Percy from Governor George Deukmejian, State of California 203
Quotations by Raphael Lemkin regarding the Armenian Genocide 203
Statement of A. Clifford Barker, chairman, the John Birch Society, Belmont, MA 204
Letter to Senator Lugar from William L. Ball, III, Assistant Secretary, Legislative and Intergovernmental Affairs, Department of State, dated May 21, 1985 (with attachment) 205

CRIME OF GENOCIDE

TUESDAY, MARCH 5, 1985

UNITED STATES SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in room SD-419, Dirksen Senate Office Building, Hon. Richard G. Lugar (chairman of the committee) presiding.

Present: Senators Lugar, Helms, Mathias, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell, Zorinsky, Cranston, Dodd, and Kerry.

The CHAIRMAN. This hearing of the Senate Foreign Relations Committee is called to order.

Today the Committee on Foreign Relations will receive testimony on the question of whether the Senate should give its consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide.

The committee's most recent hearing was held last September, shortly after President Reagan announced his support for the Convention. At that time, the committee recommended the Senate approve ratification of the Convention.

Time ran out, however, before the Senate could do so. Therefore, in the closing hours of last year's session, the Senate passed Senate Resolution 478. Senate Resolution 478 reaffirmed Senate support for the principles contained in the Convention and pledged that during the 99th Congress the Senate would consider the Convention expeditiously.

Today's hearing is a step in fulfilling the mandate contained in Senate Resolution 478. It will also afford the committee an opportunity to hear from members of the public on this Convention. The committee has not done so since 1981.

That Americans consider genocide abhorrent, a crime against all humanity, is plain. The leading role Americans took in prosecuting those responsible for Nazi atrocities, the efforts the United States has made since to find and punish those who escaped justice at Nurnberg, and the revulsion expressed by all Americans to the genocidal acts committed in Cambodia and Afghanistan are a reflection of our commitment to preventing and punishing genocide.

Yet the Senate has had the Convention before it for 36 years without taking action. The length of time the Senate has had the convention under review has affected the review itself.

Events have occurred which have transformed the terms of debate. The strongest argument in favor of ratification has been shown to be without force. It is now abundantly and disappointing-

ly clear that despite the fact that many nations have signed the Convention, the Convention has failed to stop genocide.

Today the Senate is asked to approve the Convention for essentially symbolic reasons. Ratification of the Convention has come to symbolize revulsion against massive crimes against people. It has also become, as President Reagan noted last year, a statement about a nation's commitment to human rights.

Nonratification, our ablest diplomats tell us, puts the United States at a disadvantage when confronting other nations about human rights violations. The symbolism of the Convention is an argument for supporting it.

When the treaty is put to a vote, I will, as I did last year, support it. However, I will do so only on the condition that the resolution of ratification contains certain safeguards to protect the United States and its citizens.

For this reason, I intend to offer a reservation to the compulsory jurisdiction of the World Court found in article IX of the Convention. Article IX as it stands will allow any party to bring the United States before the World Court on charges of genocide, no matter how baseless.

At one time the thought that the World Court would be used for blatant political attacks or that it would allow itself to be used for such attacks seemed remote. It is no longer remote. We have only to consider our recent experience in the *Nicaraguan* case, when the Sandinista regime sought to use the Court for political purposes, and the Court sadly did not resist such abuse.

A reservation to World Court jurisdiction would help resolve other lingering concerns about the Convention. Once the United States reserves jurisdiction, other questions raised about the Convention, namely the vagueness of certain terms that appear in that convention, the standing of the convention with respect to the Constitution and so forth, can be resolved through domestic law.

These matters would become solely questions for the Congress, which must pass legislation to implement the convention, and for the Federal courts, which would interpret and apply the legislation.

While I believe that a World Court reservation would obviate the other problems the Convention presently poses, I remain sympathetic to those who believe that these issues should be cleared up at the time of ratification. Additional qualifications to the resolution of ratification would do this.

Such qualifications would also have the benefit of making it clear to the world community precisely how the United States interprets its obligations under the Convention.

In summary, I support ratification of the Convention provided the jurisdiction of the World Court is reserved. I also pledge to work with those who seek to clear up the remaining ambiguities in the convention, and who wish to clarify U.S. obligations under the convention.

I now call upon the distinguished ranking member of the committee, Senator Pell, for his opening statement. Senator Pell.

Senator PELL. Thank you very much, Mr. Chairman. I commend you for your leadership in scheduling this hearing at an early date in the 99th Congress. Actually, today's hearing carries forward the

commitment made by the Senate last October when we very briefly debated the Genocide Convention on the floor.

That debate followed President Reagan's endorsement of the treaty and the committee's subsequent action in favor of reporting the Convention to the Senate by a 17 to 0 vote.

Faced with the prospect of extended debate in the waning days of the last Congress just prior to the coming Presidential election, the Senate suspended its consideration of the treaty, and in its stead adopted a resolution expressing support for the principles contained in the Genocide Convention, and pledging expeditious action in the first session of this Congress.

This resolution passed the Senate by a vote of 87 to 2, signaling our determination to at long last get this treaty to the Senate early enough in a session to give it a favorable chance of passage.

I am pleased that the chairman has convened this hearing today, and hope we can reach agreement to consider this matter at a business meeting at a date certain in the next couple of weeks. I also hope that the administration will follow through in its endorsement which was recently reaffirmed by Secretary Shultz.

I look forward to working with the administration and the Senate leadership in ensuring that the Senate has an opportunity to vote on the Convention as soon as possible, in keeping with the spirit of the resolution adopted so overwhelmingly at the end of the last session.

Approval of the Convention will serve as a symbol of an historic commitment to fight religious and racial persecution. It would also provide tangible benefits in our continuing efforts to advance human rights throughout the world.

The Genocide Convention has been aptly termed a statement of conscience. As I have mentioned in the past, this Convention has a very real personal meaning for me, because it was through my father's efforts as U.S. Representative on the U.N. War Crimes Commission that genocide was initially considered a war crime.

I earnestly hope that the Senate, following up on the groundwork laid last fall, will at long last move ahead to give its approval to this historic document, and as the chairman, I know, must realize, I hope very much that this Convention will pass without any reservations or added amendments.

I would like to ask the chairman as we get started, when do you envision that we can have a markup?

The CHAIRMAN. The Chair is uncertain as to when the markup will be possible. I would simply respond to you, Senator Pell, by saying that after we have had this hearing, we will try to work together on a schedule that takes into consideration the other obligations of the committee.

It is not my intent to delay markup, but simply to try to fit it into the things that we are doing. We have the foreign assistance bill ahead of us, and additional hearings in our ongoing series. I would hope that we would see after today in the length and breadth of the testimony our way clear to a schedule in the near future.

Senator PELL. I realize that next week you and I will be in Geneva along with some others, but I would hope perhaps the fol-

lowing week of March 18 one might give thought to it, or in that timeframe.

I appreciate the willingness of the chairman to schedule these hearings, and look forward to them very much indeed.

The CHAIRMAN. Thank you very much.

The first witnesses will appear as a panel, and they include the Honorable Elliott Abrams, Assistant Secretary for Human Rights and Humanitarian Affairs of the Department of State; the Honorable Davis Robinson, Legal Adviser of the Department of State; and Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel of the Department of Justice.

Gentlemen, we appreciate your coming to the hearing this morning. I will ask Mr. Abrams to testify first, followed by Mr. Tarr, and then Mr. Robinson, and then the committee will commence questions of you all.

Mr. Abrams.

STATEMENT OF HON. ELLIOTT ABRAMS, ASSISTANT SECRETARY FOR HUMAN RIGHTS AND HUMANITARIAN AFFAIRS, DEPARTMENT OF STATE

Mr. ABRAMS. Thank you, Mr. Chairman.

The administration is pleased the Senate Foreign Relations Committee has scheduled hearings so expeditiously at the start of the 99th Congress to consider whether the Senate should provide its advice and consent to ratification of the Convention on the Prevention and Punishment of the Crime of Genocide.

As we stated before this committee last September, after 37 years, we believe action on this treaty is long overdue, and we commend the committee for its perseverance in taking the issue up again.

The reasons for the U.S. accession to the Genocide Convention remain as strong as they have ever been. The Convention gives concrete expression to our opposition to the horrors of genocide and symbolizes that genocide is a crime against humanity which merits international censure.

Our accession to the convention will convey clearly what President Reagan stated when endorsing the Convention last September, that the United States intends to use the convention to expand human freedom and fight human rights abuses around the world.

Ratification of the Genocide Convention will be a statement of our Nation's conscience. Our failure to ratify the Convention has given our adversaries a useful and effective propaganda tool to berate the United States and divert attention from their own human rights abuses.

It is simply time for that to stop. This is one of the most persuasive reasons for ratifying the Convention without delay.

At the committee's hearings last September, concerns were voiced about article IX of the Convention conferring jurisdiction upon the International Court of Justice [ICJ] over genocide. The result of the hearings was that, although the Senate passed a resolution supporting the principles of the Convention, the Convention did not receive Senate advice and consent.

We recognize that concerns about article IX continue in the Senate and are, if anything, heightened by the Court's action in the jurisdictional phase of the case brought by Nicaragua. The administration is committed to securing favorable Senate action at this session. We understand that the committee intends to consider carefully how to handle article IX.

It is our desire to work with the committee to resolve this issue in a manner that will permit speedy ratification of the Convention.

Mr. Chairman, the United States is the leading champion of human rights in the world. Acceding to the Genocide Convention will reemphasize this national commitment. So, I will end my opening statement the way I ended it last year. The best time for advice and consent to ratification is right now.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Abrams.

Mr. Tarr.

STATEMENT OF RALPH W. TARR, ACTING ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. TARR. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, thank you for the opportunity to appear before you today on behalf of the Department of Justice.

As you know, on September 5, 1984, President Reagan asked the Senate to give its advice and consent to the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, known popularly as the Genocide Convention.

Although the Department of State has been the primary agency working for U.S. adoption of the Convention since its signing, both in past administrations and in this administration, the Department of Justice has reviewed the Convention carefully with regard to both its constitutional and its criminal law aspects.

Shortly before President Reagan announced his support for ratification of the Genocide Convention last September, Attorney General William French Smith expressed to the President his legal opinion that there are currently no domestic legal obstacles to ratification of the Convention.

Accordingly, on September 12, 1984, then Assistant Attorney General Theodore B. Olson, who at that time was in charge of the Office of Legal Counsel, reaffirmed the Attorney General's opinion before this committee.

In his testimony, Mr. Olson expressed the view that no domestic legal obstacles currently exist to the ratification of the Convention. By so saying, Mr. Olson merely reaffirmed the longstanding historical position of the Department of Justice, first stated to members of this committee in June 1949, by then-Solicitor General Philip B. Perlman and reiterated in April 1970, by then-Assistant Attorney General for the Office of Legal Counsel William H. Rehnquist.

I appear before you today to confirm that the position of the Department of Justice which Mr. Olson expressed to this committee only 5 months ago remains unchanged. As you are well aware, this

committee has now favorably reported on this Convention five times, in 1970, 1971, 1973, 1976, and 1984.

Since 1976, the American Bar Association has similarly urged that the United States ratify the Convention. These actions confirm our view that no domestic legal obstacles currently exist to ratification of the Convention, a view that I believe is fully shared by the other witnesses appearing before you today in support of this treaty.

The committee has also asked the Department of Justice to address two other issues relating to the Convention, the nature of the intent required by the Convention and the manner of its proof, and the nature of the implementing legislation the Department believes is necessary to fulfill the U.S. obligations under article V of the Convention.

In our view, the first issue raises no novel legal questions. Article II of the convention defines genocide as the commission of one of the acts enumerated in the article with a specific "intent to destroy in whole or in part a national, ethnical, racial, or religious group, as such."

Article V of the Convention further contemplates that the Congress will pass implementing legislation that will make such acts Federal crimes under U.S. law. Once that legislation is enacted, we envision that in particular cases Federal prosecutors would prove the intent underlying the Federal crime of genocide in precisely the same manner as they would prove criminal intent under other Federal criminal statutes, relying upon defendant's statements, actions, or both in order to establish criminal intent.

With regard to the second issue, I have been authorized to say that the Criminal Division of the Department of Justice, together with other interested agencies and components of the Department, has prepared a draft of the implementing legislation contemplated by article V of the Convention.

That draft legislation is similar to the draft legislation to implement the Genocide Convention that was prepared during the 94th Congress and was reviewed by this committee in 1976, with some modifications designed to reflect the Department's current law enforcement policies.

That draft implementing legislation is currently undergoing the interagency clearance process. Because the decisionmaking process regarding the implementing legislation has not yet been completed, I am not in a position to comment on the particulars of the legislation at this time.

The administration intends to transmit a finished version of the administration's proposed implementing legislation to the Committee on the Judiciary as well as to this committee as soon as it has completed the interagency process.

Because the Congress will have full opportunity to report independently on the implementing legislation at that time, and because the President has declared that he will not ratify the Convention until such legislation has been enacted, we urge that this committee not defer its decision whether to report favorably on the question of advice and consent to the ratification of the Convention itself.

I am now at your service to answer any questions that you may have following Mr. Robinson's statement.

The CHAIRMAN. Thank you very much, Mr. Tarr.

Mr. Robinson, would you please offer your testimony?

STATEMENT OF DAVIS R. ROBINSON, LEGAL ADVISER, DEPARTMENT OF STATE

Mr. ROBINSON. I thank you very much, Mr. Chairman and members of the committee. It is an honor to appear again before you as the Legal Adviser of the Department of State on the issue of the Genocide Convention.

Putting aside my normal lawyerly instincts, I do not have a lengthy prepared statement for this morning's hearing.

As you know, the Genocide Convention has been the subject of multiple hearings before this committee over the last 37 years. During those hearings legal questions have been debated at very great length.

Just last September, together with Assistant Secretary Abrams and former Assistant Attorney General Olson, I appeared before you to answer various legal issues concerning U.S. ratification of this important Convention.

Rather than spend the committee's time by making a general statement or repeating answers which I previously made, I would, with your permission, prefer to make myself available for any questions which you, Mr. Chairman, and the members may have.

And I thank you very much.

The CHAIRMAN. Thank you very much, Mr Robinson.

Let us proceed now with questions to the witnesses.

Senator HELMS. Mr. Chairman, before you do that, I was tied up in a budget matter this morning. Would it be permissible for me to make an opening statement at this time?

The CHAIRMAN. Yes, please make your statement.

Senator HELMS. I thank the chairman.

Mr. Chairman, two or three evenings ago I talked at some length with Senator Sam Ervin, who in my judgment is one of the great constitutional minds of our time. Senator Ervin is very concerned about the Genocide Treaty and has been for a long while.

I do not think any of the witnesses here or anywhere else who would defy Senator Ervin's knowledge of and interpretation of the Constitution. Senator Ervin has been a sort of mentor to me.

The other night Senator Ervin expressed the hope, which I certainly share, that consideration of this Convention will not be done in a perfunctory manner, and in an atmosphere that is not deserving of thorough debate and analysis. I know the chairman feels it should be debated and should be analyzed and considered.

As for the resolution late last year on the Senate floor, it was made absolutely clear that passage of that resolution did not imply a shortcut in the proceedings in the consideration of the Genocide Convention, but in any case, Mr. Chairman, a question of this magnitude certainly deserves full consideration, especially since the arguments which have prevented its ratification in the United States for 36 years.

If these arguments were frivolous or had been superseded by the passage of time, the Genocide Convention would have been ratified a long time ago.

Usually we in the Congress and in the Senate do not have the luxury of hindsight. We pass legislation and hope that the unintended consequences will not be evil. Of course with domestic legislation, legislative mistakes can be repealed. But in the international arena, it is seldom possible to abrogate a treaty without serious disruptions in our relations with other nations.

Because ratification has remained in abeyance for 36 years, we can look back and see what mistakes were made as well as new developments in international relations that may provide a different context for what was drafted back in 1948.

Explosions in human rights concepts, the development of new treaties far more sweeping in scope than the Genocide Convention, and the new activism of the International Court of Justice have shaken many preconceptions about the precision and limitations inherent in the Convention.

These were some of the things that Senator Ervin pointed out to me. Moreover, other developments in international relations could change the meaning of the Convention completely. The rise of the power of the Third World and international organizations, especially the United Nations, has changed the equation.

It is ironic that not a single charge of genocide has been brought under the treaty since it went into effect, despite the fact that countless tragic acts of state terrorism against ethnic and religious groups are perpetrated every year.

At the same time, the antagonists of the United States and its allies like Israel, for example, constantly hurl the charge of genocide against us. How can a nation like Israel, which arose from the ashes of the Holocaust, possibly be charged with genocide for asserting its viability and defending its existence?

I must say, Mr. Chairman, that we must take every step to ensure that Israel's security will not be jeopardized by this Convention once its strongest ally, the United States, is vulnerable to action before the World Court.

Finally, it is also ironic that genocidal atrocities perpetrated by the Communist nations, the Soviet Union, China, Cambodia, and others, appear not to be touched by the provisions of this treaty. Can we endure a Convention so unbalanced?

Mr. Chairman, I think we should pass a Genocide Convention, but only, only if we can make it work, and we must make it work so that our domestic affairs are not subjected to the supervision of international bodies, and that our security interests and those of our allies are not jeopardized.

I counsel, Mr. Chairman, with all the sincerity I possess, that if we do not find a way to do this, we will regret the ratification of this Convention for generations to come.

I thank the chairman for his patience.

The CHAIRMAN. Thank you very much, Senator Helms. I appreciate your leadership and help on this particular day. We will proceed at least until 12:30 this morning or as far as we can go, and then we will need to recess until 2 o'clock this afternoon for additional witnesses.

The Chair will be occupied with some other duties of the Foreign Relations Committee, and would ask the distinguished Senator from North Carolina, Senator Helms, to preside this afternoon, which he has agreed to do, so I am grateful to you.

Senator HELMS. I am delighted to do it, Mr. Chairman.

The CHAIRMAN. We will begin the questions at this point. I would like to ask, each of you or any of you, as the case may be, this. I indicated in my opening statement that I intended to propose a reservation to the Convention.

The reservation I have in mind is a strong one, one, for instance, that may be similar to that proposed by India at the time that nation ratified the Genocide Treaty, which says in essence the United States would not be bound by any World Court decisions in cases in which it does not agree to be a party.

Would the administration support such a reservation?

Mr. ABRAMS. Mr. Chairman, we would support such a reservation for two reasons, reasons I guess I can find in events that happened since the last time we testified. One event is that, in fact, the Senate once again did not give its advice and consent to the convention, and then second the *Nicaragua* case in the World Court, and how that turned out on the jurisdictional question.

It seems to us that these events lead us to conclude that a combination of our sense of what it would take to get the convention through, and that is our main goal, and a sense of prudence about future uses or abuses of the Convention in the World Court, lead to the conclusion that such a reservation would be sensible and may be necessary to achieve the Senate's advice and consent.

Mr. ROBINSON. I might add to that, Mr. Chairman.

The CHAIRMAN. Mr. Robinson.

Mr. ROBINSON. With regard to the specific language of an article IX reservation, we would like to work with the committee. We would like to hear the various concerns that might be expressed before recommending or agreeing upon any particular language.

Frankly, as an attorney, I would find some questions that could be raised with regard to the meaning of the Indian reservation. If there were to be a reservation, I presume we would want to avoid any ambiguity or possibility of misinterpretation by the Court.

Mr. TARR. Mr. Chairman, certainly from the Department of Justice's standpoint, we would echo what the Department of State has said, and in fact defer to it. I would add that putting that into the analysis that we have already done would not make any difference in our testimony: there are no legal obstacles domestically to ratification of the Convention with the kind of reservation you suggest.

In fact, as I understand, such a reservation may well lead to mitigating some of those concerns.

The CHAIRMAN. Well, to nail down this point, in other words, the administration would support a strong reservation, as you have stated, Mr. Abrams, for two reasons, one of which, you believe that it is likely to increase the chances that the whole Genocide Treaty would be ratified by the Senate if there was such a reservation.

So, from a pragmatic procedural point of view, the administration favors it.

Second, though, if I hear you correctly, you believe also on the merits, quite apart from the pragmatism of procedure, and you

have cited the *Nicaraguan* case as a recent case in point, that there is good reason to try to draft a strong reservation. And in addition, your colleague, Mr. Robinson, has added that the administration would work with the committee in making certain that at least as many foreseeable circumstances as we can in our collective wisdom foresee would be pinned down by the language of that reservation?

Mr. ABRAMS. That is correct, Mr. Chairman. That describes our position.

The CHAIRMAN. Can any of you respond specifically to the criticism that has been raised by the term "mental harm" in article II? From time to time it has been suggested that this is an ambiguous phrase, and that it means a lot of different things, depending upon the context, but could lead at least in an international context to some mischief.

What suggestions do you have for the remedy of the ambiguity of the two words, "mental harm," as they appear in article II?

Mr. ROBINSON. I would be happy, with your permission, Mr. Chairman, to attempt to answer that one. In 1976, the Senate Foreign Relations Committee proposed three understandings and a declaration to accompany ratification of this Genocide Convention. Last fall, in our testimony we again supported those understandings and declarations.

One of the understandings, the second one, which I will read, says, "That the U.S. Government understands and construes the words 'mental harm' appearing in article II(b) of this Convention to mean permanent impairment of mental faculties."

Emotional distress, for example, would not fall within the words "mental harm." That is an understanding that the administration continues to support, Senator, and that we think is indeed justified.

The CHAIRMAN. Well, this means, just to pin it down further, that forms of mental harassment or intolerance or such activities as this are not what you envision as mental harm, and by trying to move toward permanent impairment of mental faculties you are attempting to bring greater precision and severity to those words.

You would propose, once again, all three of these understandings to article II, that they ought to be a part of our consideration of the Genocide Treaty?

Mr. ROBINSON. That is correct, Mr. Chairman. Two of the understandings, if I recall correctly, apply to article II, and one applies to article VI, and we do continue to support those understandings and also that declaration.

I agree with what you enunciated with regard to the meaning of mental harm.

The CHAIRMAN. Are there any other reservations or understandings that you would advise us to consider as we get into these hearings and deliberations?

Mr. ROBINSON. For our part, Senator, we at the Department of State do not know of any other reservations that we would regard as either appropriate or necessary.

Now, again, I am saying reservation as distinguished from understanding. We would be happy to work with you in the event there are any further understandings. We again think what was proposed in 1976 is adequate. Our major concern as expressed by Mr. Abrams is to get this Convention through as rapidly as possible.

Now, possibly my colleague, Mr. Tarr, would like to add to this issue on behalf of the Department of Justice.

The CHAIRMAN. Mr. Tarr, do you have any additions?

Mr. TARR. No, I do not have anything to add to that.

The CHAIRMAN. Mr. Abrams, you have stressed in your testimony, and so have your colleagues, that you strongly support ratification of the treaty, that you believe this will be of value in American diplomacy.

Can you elaborate further as to why you believe that there should be prompt action, albeit with the reservation and understandings that we have been discussing this morning? Why in an overall sense would prompt activity be important?

Mr. ABRAMS. Mr. Chairman, it is a strange anomaly that the United States, which is the leader of the free world, the strongest democracy in the world, and its leading proponent of human rights, should not be a party to the Genocide Convention, which, as Senator Pell points out, we helped to write.

It puts us on the defensive in a number of debates. It is a constant in Pravda and Tass, and in fact at the time of the hearing last fall there was immediate mention in the Soviet press about the possibility of U.S. ratification of the Genocide Convention.

It also makes it more difficult for us to utilize the Convention in a situation like Cambodia, where it would be useful to refer to it in criticizing the actions of the Pol Pot government there, but we really cannot do it if we are not parties to the Convention ourselves.

So, I think in terms of overall foreign policy goals, especially, of course, human rights goals, our failure to be a party to the Convention hurts, and being a party to it would help us.

The CHAIRMAN. Thank you very much.

Let me mention before I recognize Senator Pell for his questions that the committee will hope to see a majority of members, a quorum present at some time around 11 o'clock for immediate consideration of the Pacific Salmon Treaty which is important to our country as our President prepares to meet with the Prime Minister of Canada.

So, at some point, as we see the quorum, the Chair will try to get that to a vote. I just want to ask each one of us to remain in our seats, if we can, so that we can have that expeditious action.

Senator Pell, do you have any questions?

Senator PELL. Thank you, Mr. Chairman.

First, just so that the record is clear, we should recognize that at least I certainly cannot recall any other treaty that has been considered for as long a period of time and as thoroughly or in as much detail over such a prolonged period as has this.

It was first considered in 1950, when President Truman sent it up. It was reported first by the committee in 1970, and has been reported out by the committee on four subsequent occasions. This is the 13th hearing on this treaty, and there are 96 other nations which have signed and ratified it, so I think the record should show that this is not a hastily organized proceeding, but is being done with a great deal of deliberation; and I wonder if in our Nation's history there has been any other treaty before us for as long a time or considered as thoroughly as the Genocide Convention.

Now, I would like to ask Mr. Abrams this question, because I believe we are now party to at least 80 different treaties under which we accept the jurisdiction of the International Court of Justice. Why is it necessary on the merits to have a reservation saying that this particular treaty we will not submit to the ICJ but we are perfectly willing to do it in the 40 other cases?

Mr. ABRAMS. May I defer to Mr. Robinson, the Legal Adviser, on this question, Senator?

Senator Pell. Yes, of course. Either one of you may answer.

Mr. ROBINSON. Thank you, Senator Pell. I would be happy to endeavor to answer that question.

As Mr. Abrams indicated, first of all, if we understand the concerns expressed last fall, it appears to us that it may not be possible to have the Convention finally passed after those 37 years without a reservation. Whether we are right or wrong in that appraisal, I do not know, but it appears to us that as a practical matter it may be necessary in order to have the convention approved.

Furthermore, we have gone through the experience with the *Nicaragua* case before the World Court. Let me say that I do want to be careful this morning with regard to that suit, since it is, of course, pending before the Court. When the President made the decision not to participate further in the case, we issued in the Department of State a rather lengthy statement as well as observations on the November 26 decision of the Court, which I think speak for themselves.

We believe that the question of genocide could be a highly charged issue. Of course, we believe it would be preposterous that ever anybody could make any valid accusation against the United States that it had engaged in any acts or offenses involving genocide.

Nonetheless, with the experience that we have recently undergone, and when combined with the practicalities, we think that a World Court reservation would be not only wise, but desirable at this point.

Senator, let me say we do recognize that there are indeed, if I recall, 40 multilateral international agreements and 40 bilateral international agreements that do have a World Court provision, and of course there are others that are now pending before the Senate that also have those provisions.

Senator PELL. Thank you.

Following up, Mr. Robinson, on your thought about instances of genocide, what instances of genocide could be cited by the United States if we were a party to the Convention that we can recall in recent history?

Mr. ROBINSON. Well, Senator, the convention, as we all recall, emerged from the tragedy of the Second World War. That is what triggered the Convention. Now, I would want to be careful with regard to any other particular instances that might constitute genocide frankly for fear of causing a problem where maybe we do not need one.

So, I think with all due deference I might avoid speculating on other instances other than the one that clearly triggered the treaty in the first instance.

I do not know whether Mr. Abrams wants to add to that.

Mr. ABRAMS. I would just add, Senator, that one of the uses of the convention, of course, is to raise the question under it of whether an action does constitute genocide. If you take the case of Cambodia, one need not decide today by constituting ourselves in a sense as a court whether what happened in Cambodia was genocide in terms of the Convention.

It was mass murder of the most brutal and horrible sort, and certainly it would have been useful to raise the question in terms of the Convention.

Senator PELL. Has the question of genocide been raised before the ICJ since genocide was created as a term of art by Rafael Lemkin?

Mr. ROBINSON. Senator, as far as I am aware, the answer to that is no. There has never been any suit before the World Court alleging genocide either under the Genocide Convention or as a matter of customary international law.

Senator PELL. That is my recollection, too. Several critics of the Genocide Convention have expressed concern that the Convention might be used as a club against Israel. How would U.S. ratification of the treaty affect in any way Israel's status under the Convention?

Mr. ROBINSON. I might answer that, Senator. Israel has, in fact, been a party to the Convention since, I believe, 1951.

Mr. ABRAMS. 1950.

Mr. ROBINSON. 1950, yes, and of course the ratification by the United States would not affect in any way Israel's own commitment to the Convention.

Senator PELL. Thank you. Some of the opponents of ratification have argued that the treaty is not sound because treaties under our system should only deal with matters of international concern. Presumably these opponents would say that genocidal acts are not properly matters of international concern.

What would be the view of the Department of State in that regard?

Mr. ROBINSON. Senator Pell, I might in that regard, with your indulgence, just read two paragraphs from last fall's testimony. "The United States is already a party to numerous multilateral treaties which deal with diverse matters of concern to the international community, including in the human rights area treaties on slavery and refugees."

This is from pages 44 and 45 of last September's hearings.

Recent actions by the Senate, for example, in giving advice and consent to the Convention on the Taking of Hostages reflect the wide range of legitimate topics for international concern. In the present case, 96 countries by ratifying or acceding to the Genocide Convention have indicated their belief that the subject of genocide is a proper concern of nations. International human rights are, in our view, properly a subject of international concern. Accordingly, I believe that the Genocide Convention is clearly within the treatymaking powers of the United States.

Senator PELL. Thank you very much, Mr. Robinson.

Mr. ROBINSON. You are very welcome.

Senator PELL. Now I have another question in connection with the case of *Nicaragua*, which has been cited a couple of times here. My understanding is that the ICJ rendered a preliminary decision in May 1984 which laid the groundwork and conformed to the final

decision in November, but when you appeared before us in that in-between period, you were not particularly concerned with the preliminary decision.

What was the reason for that?

Mr. ROBINSON. Senator, that was not quite the case. It might be good if I reviewed this a little bit. Last May what was involved was the question of interim measures or, under our law you might equate it to a temporary restraining order. That was, in effect, a hearing which took place under an urgent or emergency kind of situation in Nicaragua's view.

The November decision was a purely jurisdictional and justiciability hearing. So last April you may recall that the United States took the position from the very start that the *Nicaragua* suit was not the kind of case that was proper for the World Court to hear, either under the provisions of the United Nations Charter or under what I would call our own political question doctrine. That is, by analogy, that this is the kind of question that is so inherently political that it is not appropriate for judicial resolution.

So, we have not changed any position. We have frankly been consistent from the start, and we did, of course, appear before the Court to argue the jurisdiction and admissibility issues in May. I might say that since the Second World War, there have been seven interim measures suits brought before the World Court, and only one nation in the world has ever appeared as respondent in those seven suits, and that is the United States of America, and we have done it twice.

France did not do it. Iceland did not do it. Other nations did not do it.

Senator PELL. Thank you very much.

The CHAIRMAN. Thank you very much, Senator Pell.

Senator Helms?

Senator HELMS. Thank you, Mr. Chairman.

I am glad to hear your comments about genocide. Maybe we can lay to rest the implications that I hear every so often that anybody who questions this treaty is in favor of genocide. We are all against genocide, but there are some of us who are concerned about sovereignty, too.

Mr. Chairman, while you were posing your questions I took a copy of my proposal down and gave it to each of these gentlemen. I do not want them to comment on it now, but I want them to look at it and think about it, and then when we come to mark up, or some time prior to mark up, I would like to have their reaction to it.

[The proposal referred to follows:]

HELMS SUBSTITUTE FOR THE RESOLUTION OF RATIFICATION OF THE INTERNATIONAL CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

[Commentary indented]

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948 (Executive O, Eighty-first Congress, first session), subject to the following conditions:

1. That the United States ratifies this Convention subject to the condition that the crimes of genocide specified to this convention include "complicity of government"

as an essential element, and shall not apply to regular or irregular military conflicts as they are defined in customary international law.

Comment: This condition is intended to clarify not only specific ambiguities present in Articles I, II, and IV, but also the combined impact of all three articles taken together. The concept of genocide is fundamentally rooted in the notion of state-sponsored terrorism intended to destroy, in whole or in part, a national, ethnic, racial or religious group. Although individuals may be the instruments of state policy, or indeed the instigators of state policy, the element of state policy is essential to a proper understanding of genocide as distinguished from other crimes. As the 1984 Report of the Senate Foreign Relations Committee stated: "Since it is unlikely that genocide could be committed without the explicit or implicit approval of the government of the country in which it occurred, the absence of a specific reference in article IV could be considered a "drawback," but even a "fatal flaw," since it would lead to inevitable confusion of genocide with other crimes of purely domestic concern. In the highly politicized atmosphere of the United Nations and all its agencies, countries antagonistic to the United States would raise charges against U.S. officials—in the Executive, Judicial, and Legislative branches—claiming that their actions fell within the definition of genocide. Moreover, within the domestic jurisdiction of the United States, the Genocide Convention might be appealed to in judicial action concerning the acts of individuals. The condition herein proposed would in no way exempt or diminish the liability of individuals for genocidal actions, but it would ensure that the Convention could not be appealed to for redress against crimes that may be akin to genocide, but lack the element of state complicity.

Moreover, Article I contains an ambiguity that might be interpreted as superceding current customary international law with regard to armed conflicts. The phrase, "whether committed in time of peace or in time of war," does not distinguish between genocide as such and acts which are committed within the framework of regular or irregular military conflicts. Such conflicts often occur between military groups composed of differing ethnic or religious groups. While it is true that state-sponsored terrorism against ethnic or religious groups often includes military oppression, the converse is also true that regular or irregular military action is often the only practical way to stop such oppression. The danger is that those who are fighting against terrorism might be unjustly accused of genocide themselves. In the highly politicized contest of the Middle East, for example, Israel is frequently accused of genocide by Palestinian and Arab antagonists. By the same token, freedom fighters in Nicaragua or Afghanistan might be charged with genocide for seeking to destroy national regimes which themselves have destroyed human rights. The conditions herein proposed would in no way diminish liability for actual acts of genocide outside of a military context, but they would effectively safeguard what might frequently be the only practical redress to those fighting for independence or freedom.

2. That the United States ratifies this convention subject to the condition that the United States shall not thereby obligate itself to any act or omission prohibited by the United States Constitution, including but not limited to the enactment of legislation prohibited by the Constitution, and the subjection or surrender of any person to the risk of any process or punishment that would violate the Constitution if it were imposed by the United States.

Comment: This condition makes unequivocal the integrity of the United States Constitutional system and its independence of any external legal regime. It is directed both towards those within the domestic jurisdiction of the United States who might appeal to the Genocide Convention as a basis for enlarging or foreclosing Constitutional rights and obligations, and to those in the international community who might have a different understanding of legal process than is current within the United States. Many features of the United States legal system are unique to the Anglo-American concept of justice—the adversary system, legal precedent, presumption of innocence, and trial by jury, to give just a few examples—yet other nations, in other traditions of law, could call upon the competent organs of the United Nations under Article VIII to take actions against the United States based upon alleged failure to fulfill the Convention, when the alleged failure is simply the upholding of fundamental procedural protections to the accused. No other country in the world has the protection guaranteed

by the First Amendment in the United States. For example, on February 28, the Dominion of Canada—a country with which we share not only a continent, and a history, but a culture—convicted a man for press offenses which, no matter how repugnant to current social concerns, would have been protected in the United States by the First Amendment. Even though he was convicted under a 90-year-old law, his offenses arguably were outlawed by the Genocide Convention.

Indeed, even before the International Court of Justice, the requirements of our Constitution are no defense against the ICJ's interpretation of "customary international law." Clearly, the ICJ is obliged to disregard any defense based upon internal juridical systems. The condition proposed herein would clearly establish that Congress, in consenting to the resolution of ratification, had no intention to extend or diminish our Constitutional liberties, and that no one, in any of the three branches of government, could appeal to the Convention as an excuse to set aside our present juridical framework. Moreover, we would put the international community on notice that we regard our system as a superior protection to human rights than any other system in the world.

3. The United States ratifies this Convention subject to the condition that the term "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such" appearing in Article II, includes only the specific intent either (a) to destroy the group by causing the deaths of a substantial number of members of the group, or (b) for the purposes of Article II(d) only, to destroy the group by preventing a substantial number of births within the group: or (c) for the purposes of Article II (e) only, to destroy the group by means of the forcible transfer of substantial numbers of children of the group.

Comment: In 1976, and again in 1984, the Committee on Foreign Relations recomended an understanding that the U.S. Government construed Article II to mean "the intent to destroy a national ethnical, racial, or religious group . . . in such a manner as to affect a substantial part of the group concerned." This understanding was well intentioned, but would do little to clarify the definition of genocide or the standard of intent. The phrase "to destroy a . . . group" does not necessarily indicate the murder of the members of that group; it could be interpreted as meaning simply the dispersion of the members of a group, or the suppression of its culture. While so-called "cultural genocide" ought to be considered as a serious deprivation of human rights, it should not be confused with genocide itself. Similarly, the word "affect" lacks precision. It could be interpreted to mean a psychological or social disorientation of a more general sort, as referred to in the U.S. Supreme Court's decision in Brown vs. Board of Education, or in the abortion cases.

Nor does it distinguish between voluntary and involuntary abandonment of established social values and mores. Many Christian missionaries, for example, have expressed concern that attempts to convert non-Christian peoples to the Christian faith might result in charges of genocide from state authorities and defenders of the status quo. Whatever one's views on pyschological or social disorientation, or social change, it would be mischievous to confuse such attitudes with genocide.

In addition, the standard of intent is not clarified by the 1984 Committee understanding. We cannot assume that the International Court of Justice, or any other court outside of the United States, will view intent as it is viewed in the Anglo-American legal system. Nor even if it were, whether the standard set forth is a general intent or a specific intent. A general intent might be inferred from circumstances, or the result of circumstances, which, when allowed by a government, might be interpreted as an intended consequence. Thus the element in the definition of genocide in Article II (d), "Imposing measures intended to prevent births within the group," could easily imply any general social condition, or access to services, such as birth control or abortion, which would result in a lower birth rate or higher infant mortality for a protected group. Not even the Committee understanding of "a substantial part of the group concerned" would serve to set aside such an interpretation. Nor would a distinction between voluntary acceptance by the group of such policies, and forcible imposition, as in the population control and abortion policies in China, be a safeguard. My view, and I would argue it forcefully, is that the Genocide Convention clearly outlaws any population control policies, voluntary or involuntary, that affect a

protected group. But on the other hand, the Senate should speak clearly to this issue if it intends to ratify the Convention.

Similarly, Article II (e) defines as genocide "Forcibly transferring children of the group to another group." the failure of the 1984 Committee understanding to address itself to the question of the the number of children involved in a case of the forcible transfer of children is an omission that leaves any country open to a charge of genocide which seeks to place minority children, or children of an oppressed majority, in a foster home or to provide other necessary care away from home. The addition to the Committee's understanding makes it clear that individual cases could not be brought under the definition of genocide, but only the "forcible transfer of substantial numbers of children of the group."

4. That the United States ratifies this convention subject to the condition that the term "mental harm" appearing in Article II(b) of the Convention includes only the deliberate and permanent physical impairment of the brain through torture, drugs, or similar techniques designed to cause such impairment, and does not include psychological harm resulting from exposure to conditions not calculated to bring about the physical destruction of the group.

Comment: This condition is again an attempt to bring more precision to the Committee understanding of 1976 and 1984. The phrase "permanent impairment of mental faculties" does not distinguish between objective impairment created by physical alteration or abuse of the organs of the body, and psychological impairment which might result from general and economic social conditions, or lack of opportunity for personality development. While no one can approve a social context which results in psychological deprivation, the objective existence and extent of such deprivation is based on subjective assessment which could be highly politicized. This proposal limits the definition of genocide to conditions specifically calculated to bring about the physical destruction of the group.

5. That the United States ratifies this Convention subject to the condition that its accession to the jurisdiction of the international penal tribunal contemplated by Article VI of the convention must be effected by a treaty entered into for that purpose.

Comment: The proposal for an international penal tribunal in Article VI is quite startling and a departure not only from customary international law but also from the over-all concept of the Genocide Convention as an agreement by nations to outlaw genocide within their own jurisdictions. Article I says that genocide is a crime "under international law," but it does not say that it is crime "against international law." The distinction is that under international law—that is, under the Convention—the Contracting Parties have agreed to punish genocide under their own laws. There is no body of international law which establishes penalties and sanctions.

There does exist, however, a "Draft Statute" for an international penal tribunal for genocide, developed and approved by the United Nations, to take effect at such time as it is approved by individual contracting parties. It provides for procedures for the contracting parties to hand over accused persons for trial, but specifically rules out such safeguards as trial by jury. Although this administration and previous administrations have stated that there is no intention on the part of the United States to accede to such a statute, we cannot assume that such statements will bind future administrations. Indeed, the failure of the United Nations to take further action on the international penal tribunal may well be the result of a calculation that it is impractical to effect such a proposal unless the United States, the major world power, goes along.

Once the United States ratifies the Genocide Treaty, however, a new political dynamic may take over. Under Article V, the United States assumes the international responsibility to enact the necessary legislation to give effect to the provision of the Convention. In a changed political climate, five, ten, or even fifteen years from now, a future President might claim that the mere approval of the resolution of ratification by the Senate has given him authority, under Article V, to accede to an international penal tribunal by executive agreement, by-passing the Senate. There already exist precedents, both in Executive and Judicial practice, for the President to accede to multilateral treaties by executive agreement, without Senate concurrence. The condition proposed herein would put both future Presidents and other Contracting Parties on notice that the United States will not

accede to a statute or treaty for an international penal tribunal without the advise and consent of the U.S. Senate.

6. That the United States ratifies this Convention subject to the condition that, with reference to Article IX of the Convention, for the submission of any dispute in terms of this article to the jurisdiction of the International Court of Justice, the express consent of all parties to the dispute is required in each case.

Comment: This condition is based on the so-called "Indian Reservation" put forward by the Government of India at the time of ratification. In the light of the recent decision of the International Court of Justice claiming jurisdiction over the Nicaraguan case in the absence of factual basis in customary international law, this condition is necessary to protect the national security of the United States. It specifically eliminates any assertion of "implied" consent, and prevents the ICJ from assuming jurisdiction in ways that might prejudice the superiority and independence of the U.S. Supreme Court.

7. That the U.S. Government understands and construes Article VI of the Convention in accordance with the agreed language of the Legal Committee of the United Nations General Assembly that nothing in Article VI shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state.

Comment: This is identical with the third statement or understanding proposed by the Committee in 1976 and 1984.

8. That the U.S. Government declares that it will not deposit its instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

Comment: This is identical with the fourth statement or declaration proposed by the Committee in 1976 and 1984.

Senator HELMS. Let me say again that I have been working on this thing for a long time, ever since I have been in the Senate, and I have been working under the guidance of such constitutional scholars as Sam Ervin, Charles Rice, and others. We are trying to see whether conditions can be placed on ratification which would make the Convention work.

Now, if it is moribund, what good is it? I would like to present these proposals at a proper time for consideration to the committee, and I hope they will be examined carefully.

Now, Mr. Abrams, let me refer back to Senator Ervin. He argued constantly, forcefully, and persuasively insofar as I am concerned that under articles V, VI, and VII the United States undertakes an international obligation to give effect to the Convention to try persons accused of genocide in a competent tribunal and to extradite accused persons in accordance with laws and treaties in force.

Now, my understanding of Senator Ervin's argument is the combined effect of these three articles to create a requirement to negotiate extradition treaties in good faith. The key word is "requirement."

Senator Ervin argued further that the Convention would create an international obligation to conclude extradition treaties with all parties to the Convention.

Now, with that preface, let me ask any one of you or all three of you, would we be obligated to conclude extradition treaties with all parties? Can you tell me yes or no?

Mr. ROBINSON. The answer to that Senator, would be no. In effect there is in our view no obligation under articles V, VI, and VII to enter into a particular extradition treaty with any particular nation.

I think the language of article VII is particularly clear on that point. The second sentence of article VII reads, "The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."

It does not say that there is any obligation, either explicit or implied, to go out and negotiate new extradition agreements. Now, we might choose to do so, but there is no obligation under articles V, VI, or VII to do so.

Senator HELMS. So your answer is a flat-out, unequivocal no?

Mr. ROBINSON. Yes, sir. No.

Senator HELMS. All right. Number two: Would we be obligated to extradite our citizens, U.S. citizens to face trials for acts which our own courts have not interpreted to be genocide, but which the courts of some other nation do regard as a genocide?

I am not talking about trumped up charges or countries without due process, but I am talking about countries which have a different interpretation of genocide.

Mr. ROBINSON. The answer to that, Senator, would again be no. I would just like to add two things. One, the Genocide Convention is not self-executing. There would have to be implementing legislation. Second, our extradition treaties historically have not included genocide within their parameters.

For the crime of genocide to come within the parameters of most of our extradition agreements, there would have to be an amendment subject to the advice and consent of the U.S. Senate in addition to the implementing legislation. I should note that there are six more recent extradition agreements which would include future crimes that may become offenses under U.S. law.

Other than those six, all the other extradition agreements would have to be amended with the advice and consent of the Senate.

Senator HELMS. So from a practical standpoint again you are giving me a flat-out, unequivocal no in answer to the question, would we be obligated to extradite our citizens?

Mr. ROBINSON. No with just a couple of hems and haws as a lawyer, but fundamentally no.

Mr. TARR. Senator, may I interject something?

Senator HELMS. Sure.

Mr. TARR. I agree with Mr. Robinson on that point, and would note that there are two additional points to make on it. One is that, under U.S. extradition law, there is a dual criminality requirement that the acts be crimes both in this country and in the other country, and there is also to be added to that the fact that the Secretary of State ultimately has discretion in any situation as to whether to proceed with an extradition and to consider a number of factors in exercising that discretion.

Senator HELMS. Well, that exists now, though, does it not?

Mr. TARR. Yes, sir, it does.

Senator HELMS. Let us look at article VI, which says in part, "Persons charged with genocide," and I am quoting, "Persons charged with genocide . . . shall be tried . . . by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Does the U.S. Government have any plans to accept the jurisdiction of such an international penal tribunal?

Mr. ROBINSON. Senator Helms, first of all, there is no such international penal tribunal within the meaning of article VI. I am not aware that any has been recommended. I would not want to speculate as to what might happen in the future, but certainly we are not aware of any plan for any such tribunal. We would obviously wish to give any such proposal the most serious analysis, but there is no such international penal tribunal, and none has been recommended.

Senator HELMS. But the language is there, and the obligation is far more than implicit.

It says, "in the event that such a tribunal"—does that language not concern you?

Mr. ROBINSON. It would not be of concern, Senator, because again it would be an exercise of the treaty power of the United States, were we to accept any such international penal tribunal, and that again would be subject to the advice and consent of the U.S. Senate.

In other words, any such proposal would have to go through the full deliberative process under the U.S. Constitution.

Senator HELMS. Well, you see the problem that Senator Ervin, Dr. Rice, and others have, because you are talking in hypothetical terms and they are talking about the language which exists.

Now, let me get hypothetical. Would the acceptance of such jurisdiction require a treaty ratified with the advice and consent of the Senate, or could we accede by executive agreement?

Mr. ROBINSON. Let me take just one second on that.

[Pause.]

Mr. ROBINSON. Senator, in my view, it would clearly be a treaty, not an executive agreement, that would require the advice and consent of the U.S. Senate. That would be my opinion.

Senator HELMS. You are talking about the acceptance of jurisdiction?

Mr. TARR. Senator, let me disagree if I might, respectfully, with Mr. Robinson. From a presidential power standpoint, I think there are conceivable circumstances in which such an executive agreement could be entered into. I think we have to be fair about that possibility.

Certainly, if the Congress passed some statute or a joint resolution indicating its intent to authorize the President to proceed with such a tribunal, that would be such a circumstance in which the President could then go forward and initiate an executive agreement.

Mr. ROBINSON. If I might, Senator Helms, let me suggest that maybe for the record, in light of this possible disagreement, why don't we attempt to provide an answer for the record in which we both agree? [1]

Senator HELMS. I think that would be wise.

I have just one final question. Do you or do you not suggest that whatever position you take here, making legislative history as you have, is that binding on any future administration?

---

[1] See response to question III-31, page 178.

Mr. TARR. With regard to what aspect, Senator? I am sorry. Do you mean in any specific part of the considerations here today?

Senator HELMS. Yes. Your position. Have you read the draft statute prepared by the United Nations for the charter of the international penal tribunal?

Mr. TARR. No, I have not.

Senator HELMS. Have you, Mr. Robinson?

Mr. ROBINSON. I am sorry, Senator Helms. I didn't hear you.

Senator HELMS. There was a draft statute prepared by the U.N. people as the charter for the international penal tribunal that we say does not now exist.

I asked you if you had seen the statute, and those two gentlemen said they have not. Have you seen it?

Mr. ABRAMS. When was it drafted, Senator? It is my impression that it is a sort of dead letter that was drafted a long time ago and that no one has taken the idea of an international penal tribunal seriously for decades.

Senator HELMS. Well, I don't know what that means. Why is it a dead letter?

Mr. ABRAMS. Well, no action has been taken on it, nor has any action been contemplated.

Senator HELMS. No action has been taken on the Genocide Treaty either.

Mr. ABRAMS. Well, that is not true, in the sense that there have been hearings intermittently and, in fact, that the committee has reported it out on occasion.

So it has been under active consideration in the committee, whereas the penal tribunal, I think, has not been under even inactive consideration for a very long time.

Senator HELMS. Mr. Chairman, I don't want to take somebody else's time. I would like to pursue the subject a little bit further later.

The CHAIRMAN. Thank you very much, Senator Helms.

[Recess.]

Senator HELMS. Mr. Chairman, may I make one request, please, sir?

The CHAIRMAN. Yes, Senator Helms.

Senator HELMS. I have a concern about the draft statute of the United Nations. May I ask you, between now and markup, to address that point by point and tell me what the administration's position is, point by point?

Mr. ABRAMS. Absolutely, Senator Helms.

Mr. ROBINSON. We will be happy to do that.[2]

The CHAIRMAN. Senator Dodd.

Senator DODD. Thank you, Mr. Chairman. This morning I received a copy of the letter which you had drafted to Secretary Shultz. Maybe I missed something, but I am curious why members of the committee were not sent copies of this. The letter almost looks like a committee document. I realize you signed it alone, but something as important as this, I certainly would have liked to be

[2] See response to question III-30, page 177.

aware that this kind of recommendation or suggestion was being made to the administration.

Is there some reason for that that I am not aware of?

The CHAIRMAN. I am sorry, but I must ask which letter?

Senator DODD. The letter that was sent to the administration regarding the reservation that you suggest to article IX of the Genocide Convention.

The CHAIRMAN. I would only respond to the Senator that it was in my own personal capacity. I have announced, at least at the beginning of the hearing in a personal statement about the Genocide Treaty, that I intended to propose a strong reservation, and I have been attempting to work at least with the administration with regard to proper wording of that.

And our colloquy, our questioning earlier on asked for that support which the administration confirmed it would give.

Senator DODD. In other words, this was not a suggestion from the administration?

The CHAIRMAN. No. It was of my own volition.

Senator DODD. Let me address some questions, if I can, to our panel.

I will start with you, Mr. Abrams, and ask you this: Is it the administration's position that without this reservation, it will not support the Genocide Convention, or that it will only support the Genocide Convention if this reservation is adopted?

Mr. ABRAMS. No. That is not our position. We have never actually had to address that problem. It is our position that we don't think in our judgment that the Convention is going to move without it. And we also think it is wiser to do it with it.

But we have not taken the flat position that we are opposed to the treaty without it.

Senator DODD. In other words, you are making a political judgment about the likely situation on the floor of the Senate?

Mr. ABRAMS. No. It is the judgment of the merits as well, that we think it is the wiser course to include such a reservation for the protection of the United States.

Senator DODD. Well, when the question was asked, the very first reason given was that it would politically probably be more acceptable on the floor of the United States Senate.

That was the primary reason given. With the citing of the *Nicaraguan* case where we received an adverse decision on mining of the harbors, we have now drawn the conclusion as a result of that decision that we are now going to take a similar position with regard to the Genocide Convention, that we are going to recuse the jurisdiction of the Ccourt.

Mr. ABRAMS. No, Senator, I am sorry. The International Court of Justice has not ruled on the substantive question in that case. That remains before the Court. What the Court ruled and what we object to so strongly is that it ruled that it has jurisdiction in this case. We believe that that is totally erroneous as a matter of law.

And that question of jurisdiction is relevant to the question of genocide.

Senator DODD. But we are now going to decide, based on that particular case. That is really the reason, is it not? It is the Nicaraguan situation, not the political situation on the Senate floor or the

substance of the case, given 40 other treaties where we are subjecting ourselves to a court of justice that we were the principal supporters and architects of 40 years ago.

But because of the *Nicaraguan* case, we are now going to take the step of removing ourselves from the jurisdiction of the court on genocide.

Mr. ABRAMS. Senator, I guess I would give two answers to that. First of all, there is a political situation here, as we pointed out and as you point out.

Senator DODD. Well, that is something for us to decide. Isn't that our decision?

Mr. ABRAMS. No, it is not your decision in the sense that we are supposed to be, and we are, trying as previous adminstrations have, to pass this Genocide Convention. And we wanted to cooperate——

Senator DODD. But shouldn't we handle the politics over here? Don't you think that is for us to decide in the Senate itself?

Mr. ABRAMS. It can't be in the sense that either the administration is going to cooperate with efforts to pass the Convention, even if it takes a reservation, or it will not cooperate. And our view is that we will cooperate.

Senator DODD. All right. Let's put the politics aside. Now, what you are coming down and telling me is that because of Nicaragua, we are now going to take ourselves out of the jurisdiction of the Court on genocide.

Mr. ABRAMS. I would say it is because of the Court, not because of Nicaragua.

Senator DODD. But it's the *Nicaraguan* case, isn't it?

Mr. ABRAMS. It is the Court's ruling.

Senator DODD. It's the *Nicaraguan* case.

Mr. ROBINSON. Senator, maybe if I could interject, with Mr. Abrams' permission, I would say with all due respect it is not solely as a result of the *Nicaragua* case. The *Nicaragua* case, as we understand it, has heightened concerns which were already there with regard to article IX of this particular treaty.

The United States, this administration, very much wants to see this Convention ratified. We think after 37 years, the moment is here. And as far as we can see, the only way that this Convention will be ratified is with an article IX reservation.

Now, I might point out in this regard that a number of years ago, Senator Javits, who has over the years shown a very great interest in this Convention, took the position that a reservation with regard to article IX would not affect the substantive provisions of this Convention.

In other words, if we become a party to this Convention, its substantive provisions will still be there, and they have a great value, and we think the time has come.

Senator DODD. Well, certainly; but as you point out in your previous eloquent testimony, Mr. Robinson, in defense of the position I now have, on which you have reversed yourself. You point out that, in fact, if we accepted the reservation as proposed, and we were to bring Idi Amin, or any other tyrant that was engaging in genocidal activities to the Court, as a result of our own language that country could avoid jurisdiction of the Court because we say that both parties have to agree.

So the Idi Amins of the world would not be subjected to the Court if we were to try to bring them before that Court. That destroys the ability to ever make anything meaningful out of the Genocide Convention.

Granted, it has not prevented the Afghanistans and the Cambodias. But I think it is more than just symbolic. In fact, it won't even be symbolic if we were to remove the possibility of the United States being able to bring another nation to the Court of Justice to demand jurisdiction.

Mr. ROBINSON. Well, let me say, Senator, in that regard that the Genocide Convention has merits in itself, without article IX. There will have to be the implementing legislation.

Again, I do want to be very careful because of the fact that the Nicaragua suit is indeed pending before the Court. In order to get this Convention through the Senate, we think a reservation in proper language would be both wise and desirable because of the potential misuse of the Court for basically political or propaganda purposes.

We do not believe that anybody could bring, a legitimate suit against the United States. But we are concerned as a result of the experience that we have undergone in the *Nicaragua* suit, and if this is the price to get this very important Convention through the Senate after 37 years, we think the price is at this point, justifiable.

Senator DODD. Let's assume a situation 40 years ago. Let's assume the United States had decided they wanted to bring the Nazi regime before the International Court of Justice for the violation of the crime of genocide.

As a result of language that is being proposed here, the Nazi regime could say we refuse the jurisdiction of the Court, and that we would then have to accept it. Isn't that true?

Mr. ROBINSON. Well, the Convention emerged after the Second World War.

Senator DODD. I understand that.

Mr. ROBINSON. It is indeed true that under the general principle of reciprocity, if we were to have such a reservation, that it could be asserted against us.

Senator DODD. Doesn't that make the Convention moot?

Mr. ROBINSON. I would say the answer to that is no, because the treaty has many substantive provisions which are valuable on their own.

Senator DODD. Let me ask you this. If you wanted to adopt a reservation and if you wanted to apply reciprocity, why not apply it directly? Why not just say that we are going to reserve to ourselves the right to subject ourselves to jurisdiction to the Court in matters brought by another country that has also entered such a reservation. Thereby, you have reciprocity.

Mr. ROBINSON. There, you are getting into the actual language of whatever article IX reservation may be the most appropriate, and we would want to work——

Senator DODD. Would that make more sense to you than just the open-ended reservation?

Mr. ROBINSON. I would want to think about that, Senator. There is a problem that I foresee with any reservation which, unfortu-

nately we experienced in the *Nicaragua* suit, that a reservation can be misinterpreted. It can be misconstrued. And unless you are very careful and you have language which is unambiguous and clear, you run the risk it will be misinterpreted, as in our view, for example, the Vandenberg reservation to the compulsory jurisdiction was clearly misinterpreted by the court in the *Nicaraguan* case.

Mr. ABRAMS. I would make one comment, Senator. That is, the Convention has 19 articles and a number of purposes, one of which is simply to symbolize and demonstrate the views of the international community to get countries to adopt domestic law about genocide. And as Mr. Robinson notes, there is a lot more to it than the one mentioned in the International Court of Justice. It serves a number of purposes. I think it would be a mistake to view it as essentially a document whose purpose is to bring cases to the ICJ.

Senator DODD. Well, I understand they have more reasons for it, and I do not disagree with that.

My time has expired. I will come back to this.

The CHAIRMAN. Thank you, Senator Dodd.

Senator Mathias.

Senator MATHIAS. Thank you, Mr. Chairman.

Last year the administration opposed a reservation relating to Article IX. They opposed it, as I recall, on the grounds that several countries, including a number of Soviet bloc countries, had adopted World Court reservations, and that in each case both Great Britain and The Netherlands, exercising a prerogative that was asserted under international law, announced that the article IX reservations were incompatible with the object and purpose of the Convention. The administration did not want to be put in the position of having that rule laid against them.

The administration last year also noted that in the event that the reservation which was then being proposed by Senator Helms became a part of the resolution of ratification, that the doctrine of reciprocity would allow another party to invoke it in a proceeding before the World Court brought by the United States, therefore denying us the benefit of ratifying the Convention.

Are those not still sound grounds?

Mr. ROBINSON. Senator, maybe I should respond to that. These are still, of course, concerns, as I indicated to Senator Dodd. There is the question of reciprocity.

With regard to the United Kingdom and The Netherlands, I might point out that of the 96 nations that are parties to the treaty, I believe they and Australia—and I will correct this for the record if I am wrong—were the only nations that did take the position that such a reservation is incompatible with the object and purpose of the treaty. So you had 93, if I am correct, which did not.

[The following information was subsequently supplied for the record:]

According to information provided by the depositary, the Netherlands and Brazil have objected to reservations to Article IX of the Genocide Convention as "incompatible with the object and purpose" of the Convention. The United Kingdom has indicated that reservations to Article IX of the Convention are "not the kind of reservation which intending parties to the Convention have the right to make." Australia, Belgium, Ecuador, Greece, Norway, and Sri Lanka have objected to various reservations, including ones with regard to Article IX, but have not stated that such

reservations were considered to be incompatible with the object and purpose of the Convention.

Mr. ROBINSON. Now, in our view– and we want to study the language that was proposed with regard to any specific article—there would, of course, be the risk that a nation might say the reservation was incompatible. For my part I would not think that to be the case. But there is the risk that that could happen.

But again, I would like to point out that of the 96 nations that are party, only 3 took such a position.

Senator MATHIAS. However, you concede that theoretically it could happen.

Mr. ROBINSON. I would concede that the issue is still there. We, as you know, are not party to the Vienna Convention on Treaties, but it basically represents the practice in the world today on this point. And if you have a reservation, another nation has the right to object to that reservation and to state whether as a result they consider themselves to be in treaty relations with the country that has asserted it.

Senator MATHIAS. And did I accurately state the administration's position of last year?

Mr. ROBINSON. Yes, sir, you did. In fact, I was here in September, and I well recall that we set forth reasons at that point why we did not think an article IX reservation was wise, or shall I say desirable at that point. And Mr. Abrams might wish to amplify on this.

Last fall, this treaty did not get approved by the Senate—we obviously do not know why—but article IX has been a source of concern for many years. We believe that for better, for worse, the *Nicaragua* suit has heightened those concerns, has made them increase rather than decrease, and that as a result, if we are going to get this convention through, which is what this administration so very much wants after 37 years, that probably the only way to do that is with an article IX reservation.

Mr. ABRAMS. I would only add, Senator, that as I mentioned to Senator Dodd, I think that it is unfortunate if we view the Convention as a document essentially pointing toward the ICJ. Its purposes are broader. Its historic role I think is much broader.

It may well be that political pressure on questions relating to genocide is the most effective means we have of getting governments to change their behavior. So even if it had the negative effects which you suggest, I think with respect——

Senator MATHIAS. That you suggested, not I suggested. I was quoting you.

Mr. ABRAMS. The question is whether that makes the treaty—whether we are better off doing that and having the treaty or not having the treaty. And in our view, we are much better off having this treaty get the advice and consent of the Senate.

Senator MATHIAS. Well, I am afraid this is confirmation of the old principle that hard cases make bad law.

Let me go on to another point. My neighbor, the distinguished Senator from North Carolina, last year proposed another understanding, and that provided that the Genocide Convention would become effective as the domestic law of the United States only through implementing legislation, which in his words would be valid in the absence of the Convention.

The administration opposed that last year, as I recall, although the Senator from North Carolina explained that his purpose was to provide legislative history making it clear that the U.S. interpretation of the Genocide Convention is that it neither adds to nor subtracts from the Constitution under the Supremacy Clause.

Have you taken a position on that understanding should he happen to offer it again this year?

Mr. TARR. Senator, we would raise the same concerns we raised last time with regard——

Senator MATHIAS. And it would be fair if you want to say it is a hypothetical question at the moment.

Mr. TARR. Well, I have quickly glanced at Senator Helms' proposed reservation this year, and it is slightly differently worded and raises some additional different questions. But essentially, we view the reservation as unnecessary in light of the power that Congress has outside of the Convention to pass the implementing legislation that would be necessary under this Convention.

Senator DODD. Mac, would you yield?

Senator MATHIAS. All right.

Senator DODD. I have heard that answer over and over again, and there are a lot of our colleagues that say well, if it is not necessary and it is harmless, why not put it in? Is it harmless?

Mr. TARR. Well, let me say that we would never be in a position of supporting something that misstated constitutional law. So to the extent that it was an effort to overcome the famous case that has been talked about in these Genocide Convention hearings since time immemorial—the *Missouri* v. *Holland* case—to the extent it was an attempt to override that case, we would have to make clear that it would not have that effect, it cannot have that effect.

The Senate acting alone in this situation in giving its advice and consent to ratification certainly is not even passing legislation, and it is clear from the Supreme Court cases that legislation could not overcome the constitutional provisions. So once the Convention is ratified, that Convention, like any other treaty, would have its effect constitutionally if there is such an area of expansion, of expanding Congress' ability to pass laws. But our statement is that we do not view it as expanding that area with respect to genocide.

Senator DODD. There is the specific provision in the Constitution which allows for the implementation of legislation regarding international agreements.

Mr. TARR. That is right. Article I, section 8, clause 10. Also since the time when this was a heightened controversy in the early 1950's, there has been quite an expansion of the use of other provisions of the Constitution to pass various civil rights laws, for example.

The only additional point that I would raise is one that the State Department may want to comment on, as to whether or not there would be any international effect from language which essentially did not really have any domestic effect.

Senator DODD. Sorry. I apologize.

Senator MATHIAS. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Mathias.

Senator Kerry.

Senator KERRY. I have no questions.

The CHAIRMAN. No questions.

Senator Pressler.

Senator PRESSLER. First of all, I want to add my welcome to the panel here, and say that I have been getting a great deal of mail, I suppose as all Members of the Senate are, arguing that the Genocide Convention would supersede the Constitution and the Bill of Rights, as has been pointed out here.

What is the simplest and most straightforward answer to write back to a constituent who says that?

Mr. TARR. Senator, I think the simplest one is to write back and indicate that the Supreme Court has very clearly stated that a treaty cannot countermand the requirements of the U.S. Constitution. Now, that is the domestic impact. There may be some further question about what the international obligations created by the Convention are, and I would, of course, defer to the State Department as to the effect of the treaty on the international obligations.

Senator PRESSLER. But in terms of saying what the Supreme Court has said on that point, how would you explain that to a citizen?

Mr. TARR. Well, the Constitution of the United States is the marching order by which all treaties and laws passed by Congress must abide.

Senator PRESSLER. Do any of you have anything to add to that?

Mr. ABRAMS. This is an argument that I think has been, as you say, has been raised time after time, the notion, for example, that the words in the treaty about incitement would violate the first amendment. But as Mr. Tarr states, they cannot violate the first amendment. They do not have the power to supersede the first amendment or any other part of the Constitution.

Mr. TARR. I might add, Senator, that from a domestic perspective, the real test here is what the implementing legislation says, and that implementing legislation itself must be consistent with the U.S. Constitution.

Mr. ROBINSON. Senator, if I might add one point here to what Mr. Tarr has said. The Department of State would be very concerned about anything that would call into issue the treaty-making power in any way, shape or form.

Senator PRESSLER. You have to speak up a little bit.

Mr. ROBINSON. We would be very concerned in the Department of State if there were any question brought to the fore with regard to the treaty-making power, as would also, of course, the Department of Justice. And if, as we believe, this is a redundancy or something that is unnecessary because it says the obvious, one of our concerns in the Department of State is that you would not want to have such a question go before an international forum. In other words, questions that have to do with the Constitution of the United States and how that Constitution is interpreted are for the Supreme Court of the United States; and we do not believe as a general matter that we would want to have any issue or question raised that would give an international forum an opportunity to interpret our own Constitution. That is not for an international forum; that is for the Supreme Court of the United States.

Senator PRESSLER. Let me ask this. Now, we have heard about the genocide treaty. For years, Senator Proxmire gave a floor

speech every day on this subject. But all of a sudden, in October, the President endorsed it.

What led to that decision, or what do we get out of it, or who decided to recommend to the President that we do this? What caused it to occur at this time?

Mr. ABRAMS. Well, I think that question was raised primarily by Senator Biden at the hearing in September. We had been studying the convention for I guess about 2 years. I remember testifying in my confirmation hearing before this committee that it would take just a matter of, you know, 6 months to clear up the matter of the Genocide Convention.

What we then encountered was a desire on our part to get it passed, and so we started reviewing possible declarations, understandings, reservations that we thought would be helpful; and we went back and forth with the Justice Department, and back and forth and back and forth, and the end result of all of that work was to get exactly where we had started; that is, the 1976 package that this committee had passed. And then we had to put that through the interagency approval process, get White House approval, and it went over to the White House it seems to me in the summer. It took the usual amount of time to get cleared with the counsel and so forth over there.

I guess I am one of the people who is responsible for pushing this process along, with the view that I expressed earlier here that it is damaging to the United States, as people such as Ambassador Kirkpatrick and Ambassador Kampelman have indicated in international fora, not to have become a party; and it would be useful to the United States to be a party.

Senator PRESSLER. Do you foresee any future conditions that this could be detrimental to the United States? I cannot cite an example, but let us say we are supporting activities in some part of the world or a Vietnam-like situation arises where we find ourselves actually in combat, where other nations of the world would twist this thing against us.

Who decides, who makes the ultimate decision when genocide is being carried out, and what happens?

Mr. ROBINSON. Well, I might comment on that, Senator, in that in the Vietnam situation, to the extent that American soldiers were being held by the Vietnamese Government, if the Vietnamese wished to trump up charges against the American servicemen, there is not very much that we could do about that because they are, in effect, in the possession of the Vietnamese Government.

The question is in this case where there was a request for extradition from the United States. In order to have that occur, first of all, under the proposed declaration of the Senate Foreign Relations Committee in 1976, which we fully support, the instrument of ratification of this Convention would not be deposited until the Congress had passed the necessary implementing legislation. So you have both implementing legislation and——

Senator PRESSLER. OK. Well, let us say they were a party to this treaty. I just want you to give me an example of how this thing would work. Give me an example of what would happen. I mean first there would be a vote, and then exactly what would happen if

this were brought in force against the United States or some other country?

Mr. ABRAMS. If I could ask just one clarification, Senator. You mean what would happen if——

Senator PRESSLER. If a violation of the treaty is found.

Mr. ABRAMS. There are two possibilities. One is simply for a foreign government to try to haul us before the International Court of Justice.

Senator PRESSLER. OK. They could take us before the International Court if they suspect us of violating, or some other country, country X, let us say.

Mr. ABRAMS. And it is the events of the last few months that lead us to view more favorably any reservation to article IX which deals with the question of ICJ jurisdiction.

Mr. ROBINSON. And that is as a government only. In other words, the ICJ could only have a suit between sovereign states.

Mr. ABRAMS. It has no jurisdiction over individuals. So then you have the second set of facts, what happens if a foreign government accuses an American of complicity in an act of genocide. There I think the key question is where is he. If he is in the physical control of the foreign government, if he is, for example, locked up in Moscow, then there is not a lot we can do with or without the Convention.

Senator PRESSLER. OK. Walk me through two or three examples. I am not arguing with you. Just walk me through about two or three simple examples of what would happen under this treaty, carrying it out to enforcement.

Mr. ABRAMS. OK. Let us take the case of say an American who is here and is accused of having participated in an act of genocide, let us say in Vietnam, by the current Government of Vietnam.

Senator PRESSLER. OK.

Mr. ABRAMS. And they then seek to get him out of the United States, bring him back to Vietnam and try him. I would ask Mr. Tarr I think to deal with that, because the first question that arises is extradition.

Senator PRESSLER. All right. Let us say that they accuse William Calley under this treaty, what would happen? Who would decide?

Mr. TARR. Who would decide as far as extradition is concerned?

Senator PRESSLER. Who would decide if he is guilty of it?

Mr. ROBINSON. I think, Senator—and Ralph, correct me if I am wrong—first of all, the crime of genocide is not at this point an offense under our Federal criminal statutes. So first of all you have to have implementing legislation that would make genocide a Federal offense.

Next there is the question what is the reach of that statute. Are you going to try to reach Americans for events overseas? Are you also going to attempt to reach non-Americans for events overseas? These are the kind of questions which will arise not only with respect to the implementing legislation, but also with regard to the extradition agreements. So that before a Calley could be extradited, first of all, there would be the question of the extradition treaty with Vietnam, but also you would have to go ahead and make a statute which would add dual criminality.

Senator PRESSLER. OK. But I guess I am not getting my question across. Under what you are recommending and under the ideal circumstances that you would recommend, give me three examples of this thing being carried out in country X and country Y, if that would make it easier.

Mr. ABRAMS. Well, I think, you know, Senator, with respect to individual Americans this really does not present a problem for this reason. The kind of government that is going to seek, for example, to extradite individual Americans, say the Government of Vietnam, is the kind of government we would never extradite anybody to under any circumstances whatsoever because he would simply not get a fair trial. We do not extradite for criminal acts in a foreign country when there is no chance of getting a fair trial in that country. This would be true, for example, of Vietnam.

So that I think in a sense takes care of the real problem cases—the Soviet Union, Vietnam, or other countries like that which would be most likely to try this kind of act. Those which would try this kind of act against us as a country in the International Court of Justice, well, there is a solution to that, and that is the reservation that we now say we think is a wise one to article IX, which would say there is no jurisdiction in the World Court unless in the individual case we agree to it.

So I think that that offers both individual Americans and the country as a whole protection against the abuse of the Genocide Convention.

Mr. ROBINSON. In other words, Senator, under our extradition practices, an American could not be extradited to a foreign country unless a U.S. court found that there was probable cause to believe that the American had committed the offense with which he was being charged. If it was a totally trumped-up charge, he would not be extradited.

Senator PRESSLER. OK. Well, I am infringing on other Senators' time. But assuming that the Court—and please answer this in writing, because I do not want to take up other Senators' time unless they are interested in this—assuming that the Court allowed for it, how would that differ from the present situation? And also, the Genocide Convention defines mental harm as one of the several genocidal acts covered under the terms of the treaty. Give me a situation or two where inflicting mental harm would be an offense. I just want to see two or three clear examples so I can send them to my constituents as to how this thing would work.

Can we get that? I mean I know there are a lot of ifs and so forth, but give me two or three examples under current law or current situation and submit them in writing so I am not infringing on others' time.

Mr. ROBINSON. Thank you, Senator. We will be happy to do that.

[The information referred to follows:]

In ratifying the Convention, the United States would assume the obligation to enact domestic legislation making genocide a crime under U.S. law, and the United States would agree that genocide could not be regarded as a political offense for the purpose of extradition. These obligations would be unaffected by a reservation to Article IX of the Convention. The following three examples provide a general outline of how extradition requests for the offense of genocide would be processed.

1. Person in the United States, accused of committing genocide abroad. If genocide were a crime in the United States and an extraditable offense under a treaty be-

tween the United States and another State, that State could seek the extradition from the United States of any person, including a U.S. citizen, who had been accused of genocide in the foreign country. Like all other extradition requests, the State requesting extradition would have to produce sufficient evidence to persuade both a U.S. court and the Secretary of State that there was probable cause to believe the person sought committed the offense with which he was charged. Even then, however, since the United States would have made clear by ratifying the Genocide Convention with the third understanding by the SFRC in 1984 its right to bring its nationals to trial before its own courts for acts of genocide committed outside the United States, we might seek to prosecute in the United States in accordance with our own implementing legislation, rather than extradite.

2. U.S. citizen abroad, accused of committing genocide abroad. A U.S. citizen who is charged with and arrested in a foreign country for the crime of genocide would be subject to criminal proceedings in that country in accordance with its domestic law. U.S. ratification of the Convention would not alter that basic situation.

However, it is possible that the United States, as a party to the Genocide Convention, could, in such a situation, prevail upon the foreign country to extradite the U.S. citizen to the United States for trial here on the genocide charges. This would, of course, depend on a number of factors, such as whether an extradition treaty was in force between us (if a treaty were required by the foreign state in order to effect extradition), whether genocide was an extraditable offense under the treaty, whether the United States had jurisdiction to bring the accused to trial for the offense, and, generally whether we could persuade the foreign country that justice would be served by allowing the trial to take place in the United States.

3. U.S. citizen abroad, accused of committing genocide in the United States. Finally, if a U.S. citizen commits the crime of genocide in the United States and is detained in another country, the United States could seek extradition from that country in accordance with the extradition procedures described above.

The phrase "mental harm" was inserted at the instance of the Chinese representative on the grounds that acts of genocide could be committed against a group through the forcible application of narcotic drugs. It is evident, however, that mental faculties may be permanently impaired in other ways.

The CHAIRMAN. Thank you, Senator Pressler.

Senator Trible.

Senator TRIBLE. Thank you, Mr. Chairman.

Gentlemen, your statements are remarkable for their absence of arguments in favor of this Convention.

Secretary Abrams, you have essentially presented one argument. In my words, it would be that in this great war of ideas it is important for the United States to be on a level playing field with the bad guys. In your words, and I quote, "Our failure to ratify the Convention has given our adversaries a useful and effective propaganda tool to break the United States and divert attention from their own human rights abuses. It is simply time for that to stop."

Gentlemen, can you suggest any other reasons why this Convention ought to be ratified?

Mr. ABRAMS. Yes; Senator. And I think all of us may be guilty of the crime of brevity. Our statements in the hearing in September were longer, and we attempted not to go through them fully.

Senator TRIBLE. This is the slimmest statement I have ever seen presented.

Mr. ABRAMS. Well, the hearing, which we did only 6 months ago, I think, went into more detail about that.

But I think that fundamentally my view—and I believe it is shared by Ambassador Kampelman and Ambassador Kirkpatrick—is that it is very strange and does no credit to us that 35-odd years after the United States helped draw up the Genocide Convention to put the nations of the world on record in their abhorrence of a crime that occurred, to try to bind them to passing domestic legislation with regard to it, that the United States is not a party and

has been unable to ratify. It opens us to attacks. It makes it more difficult for us to respond not only to those attacks, but to other very difficult situations such as Cambodia where one would wish to refer to the terms of the Genocide Convention. And that is to say that it is useful to us in world political terms to ratify the convention, and it hurts us not to.

Nobody expects that the ratification is going to end violence in the world. We do not see this as a millenial event. We see it as a useful and helpful step.

Senator TRIBLE. Anyone care to add to that essential restatement of the one point made earlier?

Mr. ROBINSON. Well, Senator Trible, I might just add to what Mr. Abrams has said. There are almost 100 nations that have ratified the Convention, and as Mr. Abrams indicated, questions have been raised over how many, many years as to why the United States is not a party to this particular Convention. And we in the administration believe that there are benefits for the United States to take advantage of what appears to be the first real opportunity in many years to get this convention finally ratified by the United States.

Senator TRIBLE. Can you identify any instance whatsoever where a nation or a people have been deterred from committing genocide by this convention now signed by over 100 nations?

Mr. ABRAMS. I think, Senator, the question really is whether pressure of this treaty or of any actions by the civilized nations of the world have restrained any government from violent action. To that I would say, though of course you cannot prove this as if in a court of law, the answer would be yes. We think, for example, that pressures of the Western nations against a number of fairly violent governments, fairly brutal governments, including that of the Soviet Union, do have an effect on their behavior.

It is very difficult to prove from one day to the next what would have happened had we not done X or Y or Z. But certainly it has been the premise of a lot of American international political activity for decades that it matters, and that we can, by drawing attention to the crimes they are committing, at least restrain the number of them.

Senator TRIBLE. Well, I think of the Soviets in Afghanistan, Vietnamese in Cambodia, the Iranians in their campaign against the Bahais, the world is filled with examples of repression and genocide, and surely the United States uses its good offices to discourage those actions. But I question the ability of this Convention to deter those sorts of terrible actions, especially in view of your statement here today that you will support the reservation put forward by our good chairman. And I will take another talk which will no doubt mystify you in view of my earlier questions.

If we adopt an article IX reservation which says essentially the United States can opt out of a proceeding before the World Court, in view of the doctrine of reciprocity, any other nation could do the same if brought to our tribunal by us. Moreover, you have said today that the idea of an international tribunal is dead letter, to use your words——

Mr. ABRAMS. An international penal tribunal.

Senator TRIBLE. International penal tribunal. Does that not render this a nullity? Senator Dodd and I very rarely agree, but I

do believe that he has identified an important point. I will probably support the reservation, but I think if the reservation is adopted, it will render this whole exercise meaningless. It will deny to us the ability to respond in the court of world opinion, and demand accountability in order to discourage the kinds of acts that we have talked about here today.

Mr. ABRAMS. I would disagree with that, Senator, because I think it does not take us out of the court of world opinion. What it might do is take us out of the International Court of Justice, and they are two separate places.

I do not think that anybody ever viewed the real idea behind the Genocide Convention as getting you into the ICJ. Nobody ever really thought that the ICJ was going to create peace in the world.

The idea behind the Genocide Convention was that, and more broadly behind any international instrument regarding the safeguarding of human rights, that is that these kind of statements from the universal declaration of human rights right down to the Helsinki agreements in our day are a useful tool with which we can pound on those who are committing these crimes.

Not being in the ICJ I see personally as really a minor matter.

Senator TRIBLE. Clearly we have access to the court of world opinion, but I think it is equally clear, gentlemen, that that reservation and the inability of the world community to move forward on the idea of an international penal tribunal denies this convention an enforcement mechanism which renders the whole thing rather moot.

Mr. ROBINSON. Senator, if I might, I would just read two articles from the convention that are operative sections that to us do have substantive meaning. I agree with what Senator Javits said 10 or 15 years ago on this score that I pointed out earlier.

First of all, article I reads, "The contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

We would be making that solemn confirmation. Second, article V——

Senator TRIBLE. May we stop there for a moment? What does that mean? What is the practical effect of that? I am a student of the law. I have studied the law. I have practiced the law. I love to engage in discussions about the nuances of the law, but I am working in the real world.

Mr. ROBINSON. I am, too.

Senator TRIBLE. Well, I am not sure we are dealing in the same world, and I say that quite respectfully. What I want to know as a legislator is, what is the practical effect of this Convention, and those are glorious words, gentlemen, but they have no practical effect.

Mr. ABRAMS. Senator, if that is true, then it is true of many of the international agreements and declarations of the past 40 years, because there are, in fact, very few implementing agreements. In a world of sovereign States, it is extremely difficult for one State to enforce its will against another except through the use of military force. It is very hard.

But I would not take the position—we might disagree on this—that every instrument that we have entered into, for example, with respect to human rights, from the Universal Declaration to more recently the Helsinki accords, are useless.

We have in fact used them. There are people who are alive and free today because we have used those pieces of paper to bang on the heads of the Russians and others and try to hold them one-tenth of an inch closer to those commitments that they have made.

We all know that they are miles away, but if these instruments keep one more person alive, then maybe they are worth doing, and I assure you that we do use them successfully, at least in the area of human rights.

Senator TRIBLE. Mr. Abrams, that is the strongest statement you have made today, and I appreciate that.

Mr. ROBINSON. Well, I would add, Senator, as Mr. Abrams says, first of all, there is great moral suasion, and last, the other article that I would refer you to is the section, article V, which says,

> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.

That is a practical, real provision.

Senator TRIBLE. Is that being done by other countries, Soviet bloc nations and others, for example?

Mr. ROBINSON. Well, Senator, there are a number of the nations that have become a party to the Genocide Convention that have various and sundry reservations either to article IX or to other provisions. I do not know what the Soviet Union has done as a party under article V, but I can certainly find out.

Senator TRIBLE. Perhaps you could just submit that for the record, exactly what implementing actions have been taken by the Soviet Union and other Eastern-bloc countries.

Mr. ROBINSON. My understanding is that all nations that have ratified have in fact passed implementing legislation, but I will certainly supplement the record on what actions have been taken by the Soviet Union, Eastern bloc countries, and Yugoslavia.

[The material referred to follows:]

The following information on the legislation implementing the Genocide Convention of Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Romania, and Yugoslavia was provided by the Law Library, European Law Division of the Library of Congress, and is explained in their letter to the Department. We are providing only the English translations of these code provisions, which were prepared by the Department of State, unless stated otherwise.

THE LIBRARY OF CONGRESS,
LAW LIBRARY, EUROPEAN LAW DIVISION,
Washington, DC, March 13, 1985.

Re LL Eur 85-1121.

MR. HAL COLLUMS
TREATY AFFAIRS OFFICE, U.S. DEPARTMENT OF STATE,
Washington, DC.

DEAR MR. COLLUMS: In the Soviet Union and the other countries of the eastern block, once an international convention is signed and ratified and is published in the Official Gazette, it enters into the power of law and becomes part of the internal legal order. It does not require any further reintegration or implementing legislation. This is also the case of the Genocide Convention of December 11, 1948, which was properly ratified by all the eastern block countries and published in their offi-

cial gazettes. By this act the Convention became a part of their internal legal order and no further implementing legislation was necessary. However, some of these countries embodied the provisions of the Genocide Convention in their Criminal Codes. This occurred in Albania, Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Romania, and Yugoslavia. The only exceptions are Poland and the Soviet Union. Photocopies of the provisions on Genocide from the Criminal Codes of the above enumerated seven countries of the eastern block are enclosed for your information.

Sincerely yours,

GEORGE E. GLOS,
Assistant Chief.

Enclosures.

PENAL CODE OF THE PEOPLE'S REPUBLIC OF ALBANIA

ARTICLE 71

Genocide, i.e., acts committed with the intent to exterminate completely or partially a national, ethnic, racial, or religious group, as for example: a) killing the members of a group; b) inflicting severe bodily injury or causing intense emotional disorder to members of a group; c) deliberately placing a group in such living conditions as to bring about its complete or partial physical extermination; d) taking measures to lower the birth rate among a group; and e) forcibly transferring children from one group to another, shall be punished by: imprisonment for a term of not less than ten years with confiscation of property, or by death with confiscation of property.

BULGARIA

SECTION III.—EXTERMINATION OF GROUPS OF THE POPULATION (GENOCIDE) AND APARTHEID

Art. 416. (1) Anyone who, with the intent of completely or partially exterminating a specific national, ethnic, racial, or religious group:

(a) causes the death, serious bodily harm, or permanent mental derangement of a person belonging to such a group;

(b) places the group in such living conditions as to lead to its complete or partial physical extermination;

(c) undertakes measures directed toward lowering the birth rate among such a group;

(d) forcibly transfers children from one group to another, shall be punished for genocide by imprisonment for a term between ten and twenty years, or by death.

(2) (The former art. 417—Official Gazette, no. 95, 1975.) Anyone who makes preparations for genocide shall be punished by imprisonment for a term between two and eight years.

(3) (The former art. 418—Official Gazette, no. 95, 1975.) Anyone who openly and directly incites to genocide shall be punished by imprisonment for a term between one year and eight years.

BULLETIN OF CZECHOSLOVAK LAW

THE PENAL CODE

(Published by the Union of Lawyers of the Czechoslovak Socialist Republic)

The complete wording of the Penal Code—the Act No. 140 of November 29, 1961, as amended by the Acts No. 120 of December 19, 1962, No. 53 of July 9, 1963, No. 56 of June 17, 1965, No. 81 of October 25, 1966, No. 148 of December 18, 1969, and No. 45 of April 25, 1973, and as promulgated by the Presidium of the Federal Assembly on October 10, 1973, under No. 113 of the Collection of Laws of the Czechoslovak Socialist Republic.

CHAPTER 10, CRIMES AGAINST HUMANITY, SECTION 259.—GENOCIDE

(1) Whoever, acting with the intent to destroy fully or partially a national, ethnic, racial, or religious group,

(a) brings the members of such group into living conditions which are to cause their complete or partial physical annihilation,
(b) carries out measures designed to prevent children being born in such a group,
(c) forcibly transfers children from one such group to another group, or
(d) causes severe injury to the health of a member of such a group, or his death,
shall be punished by imprisonment for a term of twelve to fifteen years or by death.
(2) The same punishment shall be imposed of whoever participates in the acts defined in paragraph 1.

Penal Code of The German Democratic Republic

[Published by the Ministry of Justice]

ARTICLE 91.—CRIMES AGAINST HUMANITY

(1) Anyone who attempts to persecute, to expel, or completely or partially to exterminate national, ethnic, racial, or religious groups, or to commit other inhumane acts against such groups, shall be punished by imprisonment for a term of not less than five years.
(2) Anyone who intentionally causes especially severe injury shall be punished by life imprisonment or by death.

Hungary Penal Code

LAW IV/1978, ARTICLE 155

GENOCIDE

(1) Anyone who, with the intention of completely or partially exterminating a national, ethnic, racial, or religious group as such:
(a) kills members of the group,
(b) places the group in such living conditions as to cause its extermination or the death of individual members of the group,
(c) takes measures to reduce the birth rate among the group,
(d) forcib'y transfers children from one group to another, commits a crime and shall be punished by imprisonment for a term between ten and fifteen years, by life imprisonment, or by death.
(2) Anyone who makes preparations for genocide shall, in consequence of a crime, be punished by imprisonment for a term between two and eight years.

The Penal Code of the Romanian Socialist Republic

[Published in the American Series of Foreign Penal Codes]

TITLE XI.—OFFENSES AGAINST PEACE AND MANKIND

Article 357—Genocide:
The commission of any of the following acts for the purpose of completely or partially destroying a collectivity or a national, ethnic, racial, or religious group:
(a) murder of the members of the collectivity or group;
(b) severe injury to the physical or mental integrity of the members of the collectivity or group;
(c) the act of forcing the collectivity or group to submit to conditions of existence or to treatment which cause physical harm;
(d) the taking of measures to prevent births within a collectivity or group;
(e) forced transfer of the minors belonging to a collectivity or group to another collectivity or group, is punishable by death and total confiscation of property, or by fifteen to twenty years' imprisonment, prohibition of the exercise of certain rights, and partial confiscation of property.
If the act is committed during wartime, the penalty is death and total confiscation of property.
An agreement for the purpose of committing the offense of genocide is punishable by five to fifteen years' imprisonment, prohibition of the exercise of certain rights, and partial confiscation of property.

COLLECTION OF YUGOSLAV LAWS, VOLUME XI, CRIMINAL CODE

[Contains translation of Article 124 of the old Criminal Code which was taken over as Article 141 in the 1976 Criminal Code.]

[Published by the Institute of Comparative Law in its Collection of Yugoslav Laws, Belgrade, 1964]

CHAPTER 11.—CRIMINAL OFFENSES AGAINST HUMANITY AND INTERNATIONAL LAW, GENOCIDE, ARTICLE 124

Whoever, with intent to destroy, in whole or in part, a national, ethnical racial or religious group, commits willful killings, or inflicts serious bodily harm to or gravely impairs the physical and mental health of members of the group, or forcibly deports the population, or inflicts on the group conditions of life conducive to its extermination in whole or in part, or imposes measures intended to prevent procreation within the group, or forcibly transfers children of the group to another group, shall be punished by strict imprisonment not less than five years or by death penalty.

Senator PRESSLER. May I ask a footnote to my earlier question and the three examples? With the chairman's reservation, would you tell me how these examples would work as contrasted to our present extradition law? I mean, how things would be different?

The CHAIRMAN. Thank you, Senator Trible.

Senator Evans.

Senator EVANS. Thank you, Mr. Chairman.

We have talked at length this morning about the various reservations or provisions as they might affect this country, our Government, or our actions under the treaty.

Would you care to comment on some of the important reservations that have been talked about this morning in terms of how they would be viewed by the other signatory nations if included in our ratification of this treaty?

Would they be viewed as crippling reservations? Would they be viewed as being unusual, out of line? In other words, would these reservations to protect our own interests, whether real or perceived, cripple us in terms of our treaty relations with the other nations?

Mr. ROBINSON. Senator, let me attempt to address that. There are understandings. There is a declaration, and now the chairman is proposing an article IX reservation. All three of those are different in their nature.

In other words, an understanding is something that explains or clarifies the meaning of language, and the Senate Foreign Relations Committee has three of those which the administration supports which go back to before 1976, and those would be submitted.

In other words, if this treaty is ratified by the Senate, those understandings and that declaration would be a part of the ratification process. They would have force under U.S. law. Then the question becomes, are they accepted by the other nations around the world that are parties to the Genocide Convention. Those countries would have a reasonable time to consider those understandings and declaration and then to say whatever they want to say.

Senator EVANS. Do we have any feeling at this point as to what that perception would be from other nations of those understandings?

Mr. ROBINSON. Senator, we believe that those understandings are fully consistent with the negotiating history and with the plain meaning of the text of the convention, but we obviously cannot

give you any assurances on what kind of reaction there will be. But as far as we are concerned, they are perfectly compatible with the object and purpose of the Convention, and are perfectly compatible with its context and with its language.

Now, a reservation purports to exclude or modify the legal effect of a treaty. It is different from an understanding. It is not simply interpreting the language of a treaty. Other nations have appended a reservation to article IX. There are approximately 20 of them, of the 96 nations that have now ratified the convention.

And as indicated earlier this morning there are, I believe, three countries, the Netherlands, the United Kingdom, and Australia, that have taken exception to those reservations, and in effect say that they do not believe as a result of those reservations that they are in treaty relations with the country that has asserted the reservation.

Senator EVANS. So presumably if we were to include this reservation, the chances are that at least those three nations would not conclude that we were in a treaty with them?

Mr. ROBINSON. I have no way of speculating on what any nation will do.

Senator EVANS. Of course not. Nontheless, to the extent that the reservation to article IX is similar to those of the other 20 nations, would it not be your guess then that if the nations act consistently, they would take exception?

Mr. ROBINSON. That, Senator, may to some extent hinge upon the wording of whatever reservation might result, and we would want to work on the wording. If it was in effect similar to what these other nations have appended, one might think that these three nations would raise questions. I do not know the answer at this time.

Mr. Tarr, did you want to add anything to that?

Mr. TARR. Well, this is really more the State Department's area than mine, but as I understand from looking at the various nations that have responded, some of the nations have taken issue with the reservation to article IX itself, and said that they do not recognize that, although they recognize the nations as treaty signatories.

There are three countries, and I believe it is the Republic of China rather than Australia, that said that they don't recognize the specific countries as being parties to the Convention, so that there would be sufficient similarity possibly that they would take the same position. That is entirely possible.

Senator EVANS. Let me turn to implementation. Assuming that we were to ratify the treaty and become a member of the Convention with whatever understandings, declarations, and reservations we might attach, then presumably that would be submitted for review and response by all of the other signatory nations.

Is that essentially what then happens?

Mr. ROBINSON. Yes, Senator. What happens is, after the ratification process has been completed, following the enactment of the implementing legislation, the instrument of ratification with the accompanying understandings, declarations, reservations, whatever, would be deposited with the United Nations Secretary General as the depositary for this treaty, and he would circulate that to all the other parties.

Senator EVANS. Is there any time limit or tradition or anything else that would govern responses of individual nations to our signing of the treaty?

Mr. ROBINSON. The Vienna Convention, as I recall, to which the United States is not a party, sets forth 12 months. I think we take the position that it must be within a reasonable time.

Senator EVANS. Then, in reverse, when we become signatories, do we have an opportunity to review the reservations, declarations, and understandings of each of the other signatory nations to make our own decision as to whether we find that they are satisfactory and fall within the framework of our understanding of the treaty?

Mr. ROBINSON. The answer to that is yes, Senator, and we would, of course, undertake such an analysis.

Senator HELMS. Would it be retroactive?

Mr. ROBINSON. Yes, we would be in the position of reviewing the understandings, declarations, and reservations that had been introduced before the date that we had become a party to the treaty.

Senator EVANS. Thank you, Mr. Chairman.

Senator KERRY. Mr. Chairman, may I make an inquiry at this point?

The CHAIRMAN. Senator Kerry.

Senator KERRY. I have just a couple of inquiries, and will not take my full time. Ninety-six countries, I guess it is, have signed and acceded to and ratified this Convention. Some 19 have an article IX reservation, the vast majority of which, 11 or so, are Communist or Communist-dominated states, and none of which 19 have the kind of tradition and history of trying to stand as a moral force in the world, or trying to stand on the rule of law, or having a history of democracy.

Does it not bother you as a matter of public policy as representatives of the Government of the United States of America that you are espousing that we join in reservation with those Communist nations and those nations against our allies from Canada, Italy and many others in what I think, in joining with my colleague, the distinguished Senator from Connecticut, just nullifies the effect of this?

Does it not bother you that as a matter of policy the reservation you are expressing is one that the majority of Communist nations have imposed?

Mr. ABRAMS. Senator, I think first one should say—and again, I want to restate the disagreement. I do not think the utility of the Convention lies in the ICJ.

Senator KERRY. That is not my question.

Mr. ABRAMS. I know that. I just want to restate that, since you mentioned that you joined Senator Dodd in that, that that is a view that we do not share.

Senator KERRY. Well, then, let me follow up on that afterwards.

Mr. ABRAMS. Second, I think I should point out that the reservation is the closest thing to the one the chairman proposes is that of India, which has claimed to be a moral force in the world since its independence, but third, I think my answer to your question generally would be yes.

It does bother me, and it bothers me that we are driven to do this by an outrageous assertion of jurisdiction by the International

Court of Justice, which makes it necessary for us to agree that some protection of the United States is wise and sensible.

Senator KERRY. But it seems to me that in the longer course of human events that there is a price. You know, we have always said that the price of democracy is expensive. The price of the rule of law is expensive, and we have to as a nation certainly withstand certain nuisances in the effort to try to be able to hold other nations accountable for Cambodia, Thailand, and other things that happen in the world.

In the balance, is not the value of being able to hold those other nations accountable without reservations more important than our excepting ourselves for those few occasions when we suffer that nuisance?

Mr. ABRAMS. Not, I would say, the utility of holding them responsible in the International Court of Justice, because we can continue to hold them responsible, to use Senator Trible's term, in the court of world opinion, which is more useful in human rights terms than the International Court of Justice.

The utility of the International Court of Justice in a case such as this has traditionally been nonexistent or small, and I do not think that that gains you or loses you a great deal with respect to the utility of the Convention overall.

Mr. ROBINSON. I might add, if I could, Senator Kerry, that I think the major thrust here is either we are going to have the Genocide Convention or we are not. The bottom line of the administration is that we want very much to see the Genocide Convention ratified after 37 years and several rounds of hearings with all kinds of questions.

If that is possible, and if the price is an article IX reservation, we think that would be worth it to get the Genocide Convention finally ratified.

Senator KERRY. Mr. Chairman, thank you for letting me intercede. I appreciate it.

The CHAIRMAN. Thank you, Senator Kerry. Are there additional questions?

Senator DODD. Yes, Mr. Chairman.

The CHAIRMAN. Senator Dodd.

Senator DODD. Thank you, Mr. Chairman.

First of all, for purposes of clarity, I read Senator Javits' comments back in 1971, and you did not say this, Mr. Robinson, but just for purposes of the record he opposed any reservations on article IX.

Mr. ROBINSON. He did, sir. That is right.

Senator DODD. He emphatically opposed them in response to Senator Ervin's questions. You are correct with regard to the Vandenberg and Connally reservations, but I was somewhat confused. I thought you said that he had supported a reservation on article IX.

Mr. ROBINSON. I did not intend to suggest that, Senator. I noted the other night frankly in reading through answers to a number of questions that had been presented by Senator Ervin, that Senator Javits ended up stating that that reservation, which he did oppose, and I quote, "Would not affect the substantive provisions of the treaty."

I thought that had some importance, but I did not certainly, Senator, want to suggest that he was in favor of the reservation.

Senator DODD. What I mentioned earlier concerned a reservation that would be a modification of what Senator Lugar is suggesting. That is one that would be more directly reciprocal.

I might ask the administration to work on a draft and also a comment on it at some point.

After my good colleague from Virginia has said he agreed with me on this point, I must point this out to him. And Elliott, I want to congratulate you on your statement, and I wish you would say it more often. I think you were eloquent in terms of what this kind of Convention and treaty can mean. It is very difficult to prove a negative.

We do not know specifically how many people's lives have been saved or whose freedoms have been secured as a result of the weight of moral opinion of this country and the efforts of individual citizens, this Congress, and administrations over the years, which I think is no small measure.

It is our best export, I have often argued, and we ought not ever lose sight of that. God knows our criminal statutes are filled with crimes for which we impose severe penalties, and yet we find on a daily basis those crimes are committed over and over again, but nobody argues that we ought to purge the criminal code of the penalties imposed for violation of those crimes.

The other point I wanted to make is the one that I think Senator Helms and others bring up, and it is a concern and ought to be a concern to all of us, which is: What happens to the American citizen who could be subjected to some hardships as a result of our ratifying this particular convention?

I would like to pursue that, because it is that particular point, I think, that troubles most people. As I understand it right now, the Genocide Convention is international law. Whether or not we ratify it does not give it the effect of law. It is law in 96 countries.

That is the case, is it not?

Mr. ROBINSON. Yes, Senator; it has been ratified by 96 nations. I think the question would be, is the offense of genocide recognized under customary international law as well as being an offense under a particular treaty?

Senator DODD. My point is this. Whether or not we ratify the Genocide Convention, if an American citizen is apprehended in a foreign country and tried for the crime of genocide, the fact that we have or have not ratified the Convention does not in any way affect that particular criminal proceeding.

Mr. ROBINSON. That is true. As I pointed out in the Vietnam question earlier, where an American is in a foreign jurisdiction, well, he is in the hands of a foreign jurisdiction.

Senator DODD. Yes, there it is. However, let me ask you something. In addition to the moral argument, do we not stand a better chance of having an effect on that individual's life if we ratify this Convention? Does not that then give us an opportunity to move for extradition in order to try that American citizen for the crime of genocide under our own statutes in this country? Do we not stand a better chance of defending an American wrongly apprehended and

wrongly accused of genocide if in fact we ratify this Convention? Are we not in a better position?

Mr. ROBINSON. I would say the answer is absolutely yes, and that that is one of the reasons for going forward with the Genocide Convention.

Mr. TARR. The answer is yes, Senator, to the extent that the other nation has an extradition treaty with us, and otherwise agrees under the treaty to hand the person over for this type of offense.

Senator DODD. That brings me to the second type of case. An American citizen who has been charged with genocide residing in this country, charged with genocide by another nation. For that person to be extradited from this country, let me run through what I think are the three steps, and you tell me if I am wrong.

First of all, there would have to be an extradition treaty between the United States and the charging country. Is that correct?

Mr. TARR. That is correct.

Mr. ROBINSON. Right.

Senator DODD. And the extradition treaty would have to include genocide as among the extraditable offenses?

Mr. ROBINSON. That is correct.

Mr. TARR. Well, not necessarily, Senator. What it would have to include is some offense that charged for the acts that were committed. The reason I point that out is, for example, the act of genocide includes homocide with certain specific intent. Now, if someone can be charged with the act of homocide in both countries, then the mere fact that one country calls it genocide and one country calls it homocide theoretically would not preclude extradition.

Senator DODD. But the extradition treaty would have to recognize that. That is my point.

Mr. TARR. Yes, and the more modern type of treaty is more amenable to that type of approach, the most recent six treaties, I believe.

Senator DODD. Well, that would have to be a part of the extradition treaty, is the point. We could not just have an extradition treaty that did not mention that at all, and then allow an American citizen to be extradited.

Mr. TARR. Except, again, if I understand you correctly, it would not have to say genocide.

Senator DODD. It could say genocidal type of offenses.

Mr. TARR. It would have to charge at least one of the underlying acts.

Senator DODD. Included in the Genocide Convention.

Mr. TARR. Yes.

Senator DODD. And then, third, in the extradition process, the accused in our country enjoys all of the constitutional protections, so that a hearing and so forth would ensue. He would be given all those rights to protect him.

Mr. TARR. Senator, if I could march you through that very quickly, I am not sure if I understood Senator Pressler's questions, but essentially that request first goes to the State Department, which makes a determination.

Senator DODD. So a frivolous charge, for instance, that would be the end of it right then and there.

Mr. TARR. Right. Then if there is something to it, if there is probable cause or the like theoretically it then goes to the Department of Justice, who takes it to court, where a court makes a determination of probable cause.

Senator DODD. So in fact what you are telling me is, it is not an easy matter by any stretch of the imagination for an American citizen to be extradited under this kind of convention?

Mr. TARR. No.

Senator DODD. And to reiterate the point again, with the ratification of the Convention, we are in a far better position to protect the constitutional rights of American citizens. Is that correct as well? And that is because we can impose our own jurisdiction?

Mr. TARR. I am trying to think through quickly what you are saying, and I suppose to the extent that one could be extradited in any event——

Senator Dodd. I am thinking of the opposite case now of the American citizen in a foreign country. We would want to extradite him, to bring him back, because there would be existing legislation which he could be tried under.

Mr. ABRAMS. He could not be in a weaker position. He could only be in either the same, if the other government does not cooperate, or a better position.

Mr. TARR. You are correct in a situation where the national is in another country.

Senator DODD. I thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Dodd.

The Chair failed to ask how many Senators wanted to ask questions, and therefore did not rotate correctly. Senator Helms should have been recognized, and will be next, after the last questions by Senator Kerry.

Senator DODD. That is an egregious offense, Mr. Chairman. [Laughter.]

The CHAIRMAN. The concession was made. I would like to recognize Senator Pell for a specific comment that he wants to make, and then Senator Helms for a round of questioning.

Senator PELL. Thank you very much, Mr. Chairman.

I would just like to ask that the minority be permitted 3 days to file its minority views on the Pacific Salmon Treaty.

The CHAIRMAN. I appreciate the recognition of that reservation. The Chair would personally express an opinion, and I am hopeful that those days would not be required, because that would in effect make it very difficult to ratify the treaty this week, and, of course, with the Senate in recess all of next week, therefore the meeting of the President and the Prime Minister might not have as happy a result.

So, it is a situation of some importance. I know the Senator recognizes that, and hopefully we can work together to alleviate the concerns.

Senator PELL. We will do our best, and if the Senator from North Carolina would permit one question requiring a yes or no answer——

Senator HELMS. Certainly. As a matter of fact, I would defer.

Senator PELL. Thank you very much.

I have just one question. If this Convention were reported out by the committee in its present "unadulterated" form, would the administration support it?

Mr. ABRAMS. I think the answer to that is, we would get to that really when it got to the floor.

Senator DODD. "Unadulterated," just as it is, as it was last September?

Mr. ABRAMS. Are you talking about 1976?

Senator PELL. I am talking about the document as it is before us as is. As I understood it, the administration supported it.

Mr. ABRAMS. As reported last year. If we could put it that way, there has been no, I guess I would call it decision memo addressing that question of what position to take on an unreserved ratification at this point, so while I would have a personal view on that, I think I had better restrict myself to two comments, one, that I do not want to speak for the Secretary without having asked him, but the other is, I think there is a very strong view within the administration that we wish to see the convention get the advice and consent of the Senate and be ratified as soon as possible.

Senator PELL. Adulterated or unadulterated.

Senator DODD. That is a hell of a yes or no. [Laughter.]

Senator PELL. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Pell.

Senator HELMS.

Senator PELL. Let the record note that the witness cheerfully did not reply.

Senator HELMS. Well, it is a bit academic anyway, because there is going to be a good deal of discussion, particularly if the administration does elect to support an unadulterated version of this. You used the word "ratify." You did not mean that.

Senator PELL. Consented.

Senator HELMS. I am sorry. I was talking to the Chairman. He said ratify. You meant marking it up on Thursday, did you not?

The CHAIRMAN. Yes.

Senator HELMS. Well, we have already run into some problems on that, because I hope to have responses from these three gentlemen prior to Thursday if we are to mark it up.

The CHAIRMAN. We have not mentioned any date for markup, Senator Helms. We had just said that we would try to work expeditiously, but there has not been a date set for the markup.

Senator HELMS. Very well. Well, let me say that I certainly do not want to hold up consideration, but if I am obliged to do so in terms of protecting the sovereignty of the American people and of this Nation, I will do so.

Mr. Chairman, I noticed the puzzlement of the distinguished Senator from South Dakota and Senator Trible about the ambiguities of this thing, and they keep cropping up in various statements of the three distinguished witnesses.

Now, this is part of the problem. I am not sure anybody understands what is afoot here. Probably I do not. But just speaking as one Senator, I do not intend to sit silently when the sovereignty of this country is under assault, whether you agree that it is or not, because time passes and people move on.

I just happen to think that the Constitution of the United States is the greatest document ever conceived by the mind of man.

Now, let me go to another ambiguity, at least in my mind. Am I correct in my understanding that the genocide contemplated in the Convention cannot take place without the complicity of the state?

Mr. ROBINSON. Senator, I would like to answer that by referring to article IV.

Senator DODD. Would you speak up a little louder?

Mr. ROBINSON. Yes, I am sorry. I would like to answer that by saying that the Convention in article IV talks about persons charged with genocide, so I would say the answer to your question would be yes. It would not be necessary to have the complicity of the state to have an accusation or a charge of genocide.

Senator HELMS. Well, now, here we go. What kind of rabbit are we chasing? An individual simply does not have the resources to attempt the destruction of an entire protected group. Does anybody pretend that Hitler could have attempted the Holocaust unless it was the policy of the state?

Surely you would not say that, yet this convention does not mention the complicity of the state as an element in the definition. That is a very awkward omission insofar as I am concerned, and this has given rise to a lot of speculation whether the act of genocide properly defined can be considered against a single individual or perpetrated, for that matter, by a single individual.

In your view, is genocide a policy of state terrorism against a protected group, or can an individual commit genocide without the complicity of the state?

Mr. ABRAMS. Senator, one can envision a circumstance in which a group within a state, for example, a movement, an ethnic group, a political group, a political subdivision, would be engaged in genocide or attempted genocide even if the national government were not? There are certainly within many countries political, ethnic, or racial groups which are capable of organizing with force and violence acts of genocide against other groups.

Senator HELMS. On the other side of that coin, why is complicity of the state not relevant?

Mr. ABRAMS. Well, it is not relevant in the sense that I would argue, that if, for example, such a political movement, let us suppose, for example, that at a time when that political movement had not yet achieved power over the national state in question, over the nation state, it engaged in a massive campaign against a particular minority.

For example, suppose that there were an effort in some country by an Islamic fundamentalist group to kill all the Ba'hai in that country. That might be an act of genocide, despite the fact that the state was not participating in it.

I think one can envision hypotheses in which clearly the power of the state vastly magnifies the potential for violence and for succeeding in the genocide, but where there is enough power in the group which is not a state to warrant calling its actions genocide.

Mr. ROBINSON. I would simply add that I think article IV of the convention confirms what Mr. Abrams has said. Article IV talks about persons committing genocide shall be punished whether they

are constitutionally responsible rulers, public officials, or private individuals.

Senator HELMS. Well, Abraham Lincoln and the Union Army came under what you just said could be genocide. But one man's genocide is another man's civil war, you know.

Mr. ROBINSON. Senator, with all due respect, I think I would take exception to that in terms of Abraham Lincoln.

Senator HELMS. I am sorry, I cannot hear you.

Mr. ROBINSON. What it says in the Genocide Convention is, you need a specific intent to destroy a national, ethnical, racial, or religious group as such.

Senator HELMS. Mr. Chairman, I want to go back and emphasize the old statute by the U.N. mechanism. That does not even allow for jury trial, does it? Or you said you had not read it.

Mr. ABRAMS. Under the Genocide Convention it is not self-enforcing, and an individual charged with a crime would have to be tried in a court of law.

Senator HELMS. And that would be by the international penal tribunal I referred to earlier. Mr. Chairman, I hope that all Senators will have an opportunity to file questions in writing with the understanding that these questions will be answered before we undertake any markup on this, because it is just so fraught with ambiguities that I for one am not sure where we are headed.

I know we are all against genocide, and most of us if not all of us are in favor of sovereignty, and they collide. A great railroad disaster in terms of legislation.

Mr. Chairman, we can have an understanding that all Senators will be able to file questions in writing and get clearcut answers, because what we are going to do is bounce them back if they are not clear.

Now, I respect all of you, and I like you, but the sovereignty of this country is vastly more important than any speed in moving this convention as far as I am concerned. To heck with world opinion if I have to choose between world opinion and the sovereignty of this country.

The CHAIRMAN. Thank you, Senator Helms.

Senator Dodd.

Senator DODD. I would just make a couple of points. First, earlier I said that Mr. Robinson's statements in the previous hearing were rather eloquent, on the issue of article IX reservations, and I would like to ask unanimous consent that his remarks be made a part of this record from the previous hearing on the question of article IX. I think he stated the case very well about the reservations.

[The material referred to follows:]

[Excerpt from the Senate Foreign Relations Committee Hearing on the Genocide Convention, 98th Cong., 2d sess., Sept. 12, 1984, S. Hrg. 98-962]

Mr. ROBINSON. Mr. Chairman, with regard to the second understanding, which in effect would qualify the acceptance of the United States of the jurisdiction of the International Court of Justice under article IX of the Genocide Convention, that is indeed a subject that is not addressed by the understandings and the declaration proposed by the administration.

If we understand Senator Helms' proposal, in connection with this understanding the United States in effect would reserve the right to determine for itself whether a case brought against it under article IX of the Geneva Convention before the International Court of Justice addressed matters essentially within the domestic jurisdic-

tion of the United States; in effect, a question similar to that raised with regard to the 1946 acceptance of the compulsory jurisdiction of the court.

While we certainly understand Senator Helms' concern, we do have difficulties with this proposal. First of all, from our perspective, the fundamental purpose of the Genocide Convention is to define genocide as a matter of international concern. That is to say that the international community is seeking to define genocide as a matter which no longer can be considered solely a question of domestic interest. Thus, it would appear to us to be somewhat inconsistent with the convention to suggest that some forms of genocide may not be proper concerns of the international community.

Now, in this regard, it is very important to emphasize, as I did in my opening statement, the narrow definition of genocide in the convention which is confirmed by the proposed understandings and declaration reported by the committee in 1976. This narrow definition, in effect, in our view will ensure that genocide will not be interpreted to include matters which are legitimately of solely domestic concern.

Furthermore, another problem that we see is that the second understanding is more in reality a reservation than an understanding, and it therefore would be the first reservation which the United States would be proposing with regard to this convention.

If we are correct that it does amount to a reservation rather than an understanding, that of course would raise several issues. For example, under the statute of the International Court of Justice in article 36(6) it is provided: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." And the meaning of such a reservation could, of course, be brought into question.

Furthermore, other parties to the convention might argue that such a reservation, if it is one, is incompatible with the object and purpose of the Genocide Convention. For example, the United Kingdom, Australia and the Netherlands have already objected on such grounds to reservations to article IX made by other states in their adherence to the Genocide Convention. Thus, some states might consider such a reservation inconsistent with international law and indeed consider us as not in treaty relations with them.

Under the principle of reciprocity, furthermore, such a reservation could be invoked against the United States to divest the International Court of Justice of jurisdiction in the event that the United States itself should seek to bring a dispute under the convention before the International Court of Justice as an applicant or as a plaintiff.

Finally, we would point out that, notwithstanding the Connally Reservation of 1946, which of course applied to article 36(2) of the statute of the court and not to Article 36(1), under which the Genocide Convention would fall, the United States is a party to 40 multilateral treaties and other international agreements which provide for the International Court of Justice to resolve disputes under them pursuant to the Court's jurisdiction under article 36(1) of the court's statute. The United States is also a party to 40 bilateral treaties and agreements with similar clauses.

So therefore, with all due respect to Senator Helms, the administration does not believe that this latter understanding is an appropriate one at this time.

* * * * * * *

Senator DODD. And second, with regard to the speed, with all due respect to my good friend from North Carolina, it reminds me of the line I heard the other night when someone said they were so deliberate that it took them an hour and a half to watch "60 Minutes." [Laughter.]

We have been here now for some 35 or 37 years on this particular treaty, and I certainly do not disagree with the distinguished Senator from North Carolina that all the questions ought to be asked and answers received.

We have a significant body of evidence of legal scholars and people of disparate opinions covering the entire political spectrum that have commented, and spoken out before this committee over the past 30 odd years on this issue.

My hope would be, given the agenda that we have, we would get to a markup here and make a real effort to get this Convention out of this committee and get it onto the floor.

Senator HELMS. If the Senator would yield, I can watch "60 Minutes" in 5 minutes. [Laughter.]

But that is not the question, Senator. Do not overlook the fact that this Senate has been composed of distinguished Americans down through all of these years, including your own father.

Senator DODD. That is correct. And a strong supporter of the Genocide Convention.

Senator HELMS. Well, whether he was or was not is not the point, but I am saying to you that I do not think it was frivolous for the Senate to raise questions through the years. Those questions were sufficiently serious that the Senate did not act on the treaty.

Now, let me say to you as honestly as I know how that I will be glad to expedite this if we can come to some agreement to protect what I regard as the sovereignty of this country. If we cannot, then the folks from North Carolina just are not going to be extradited. It is just as simple as that.

Now, your side may prevail, but as long as the questions and the concerns are not answered, I think that the Senate has a duty to hold it up. We have had three men sitting here this morning who have said, in effect, well, it is not going to amount to anything anyhow.

Senator DODD. I did not hear them say that at all, I would say to the distingished Senator. In fact, I think quite to the contrary.

Mr. ABRAMS. Senator, I would take exception to that.

Senator DODD. If I could reclaim my time, I think all three witnesses said in fact that this is very important, and said it rather eloquently on three different occasions.

Senator HELMS. Well, I think it will amount to something if we lock into concrete an invasion of the sovereignty of this country.

Senator DODD. Well, I could say, if I could just reclaim for a second. I would suggest to my good friend from North Carolina that he has not cornered the market on the question of sovereignty in this country, and that every single member of this committee and this body is just as determined as he is to see to it that the sovereignty of the United States is protected and the Constitution of the United States remains sacrosanct.

We are also talking about something here which many of us feel does not jeopardize either the sovereignty or the Constitution of this country, and we have debated it for many years, not frivolously, in a very worthwhile fashion. It just seems to me we are coming to a point where we ought to try to move on this and decide once and for all whether or not we are going to ratify this Convention.

Senator HELMS. I have no doubt about the Senator's sincerity. I just think he is sincerely wrong if he says this thing is all right to go with as it is. And I thank the Senator.

Senator DODD. And I thank you. [Applause.]

I did not know that this was a political rally, Mr. Chairman.

The CHAIRMAN. The Chair would ask that those who are guests of the committee today please listen carefully, but to restrain either enthusiasm or approbation as you will. We have had a spirited exchange.

The Chair would like to propose this formula, that questions that might come to the witnesses who will be heard today from members of the committee during this working week, the Chair would ask all of you who are asked questions and asked to respond to respond within the following week, so that within a 2-week period of time we may ask our questions.

And members with their memories refreshed by the hearing today who are stimulated to ask other questions may do so, and do so with some care, and hopefully you will take no more than a week to respond, so that everybody may then have the answers and may have some basis upon which we might act.

And the Senate will return into working sessions a week from Monday, and then we will be prepared to consider where we go from there with an additional hearing or a markup, as the case may be.

Senator DODD. I thank the Chairman.

The CHAIRMAN. Are there additional questions?

[No response.]

If not, the Chair will recess the hearing until 2 o'clock, when Senator Helms will preside.

[Whereupon, at 12:33 p.m., the committee recessed, to reconvene at 2 p.m. the same day.]

AFTERNOON SESSION

The committee met, pursuant to notice, at 2:10 p.m., in room SD-419, Dirksen Senate Office Building, Hon. Jesse Helms, presiding.

Present: Senators Helms, Boschwitz, and Dodd.

Senator HELMS. The committee will come to order, and our first panel this afternoon, left to right, will be the Honorable John Norton Moore, Walter Brown professor of law at the University of Virginia; the Honorable John C. Shepherd, president of the American Bar Association; Prof. Grover Rees of the University of Texas Law School; and the Honorable Robert A. Friedlander, professor of law, Pettit College of Law at Ohio Northern University. We will go in that order, and you may proceed, Mr. Moore.

STATEMENT OF JOHN C. SHEPHERD, PRESIDENT, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY JOHN NORTON MOORE, CHAIRMAN, STANDING COMMITTEE ON LAW AND THE NATIONAL SECURITY, THE AMERICAN BAR ASSOCIATION, AND WALTER BROWN PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA LAW SCHOOL, CHARLOTTESVILLE, VA

Mr. SHEPHERD. Thank you, Senator. If I may, I will proceed on behalf of Professor Moore with our joint opening statement.

My name is John C. Shepherd, and I am privileged to serve as president of the 311,000-member American Bar Association. I am in the private practice of law in St. Louis, MO. Accompanying me today is the chairman of the American Bar Association's Standing Committee on Law and the National Security, John Norton Moore who, as you have mentioned, is the Walter L. Brown professor of Law and director for the Center of Law and National Security at the University of Virginia Law School.

It is a distinct honor for us to accept your kind invitation to express the American Bar Association's strong support for prompt Senate advice and consent to ratification of the Convention on Prevention and Punishment of the Crime of Genocide, with the three understandings and one declaration recommended by President Reagan and endorsed by this committee last fall without any dissent. Thus conditioned, the American Bar Association urges prompt Senate approval of this treaty and congressional enactment of the necessary implementing legislation.

As honored as I am to appear before you today, I am troubled that there remains any reason for this hearing. Next month marks the 40th observance of the Allied Liberation of the Nazi concentration camps, where the horror of mass extermination was the grim reality for 6 million souls. Next month also marks the 70th commemoration of the Armenian Genocide. These historical realities, as incomprehensible as they are for us to fathom, are mirrored in potentially similar acts of more recent vintage in Iran, Kampuchea, Uganda, and Nicaragua. When we survey this hideous barbarism, we can understand President Reagan's observation last September 6 that, "if free men and women remain silent in the face of oppression, we risk the destruction of entire peoples."

Thus, what particularly troubles me today is that some 36 years after the Genocide Convention was submitted to the Senate for its advice and consent, we continue to argue and debate whether symbolic acts are important, whether legal instruments are worth drafting, whether the idealistic principles upon which our country was founded and prospers today are worthy of continued vigilance.

As lawyers, we have a strong obligation—indeed a professional responsibility—to further our noble goal of equal justice under law. It is not, as we are all aware, a full reality even in these United States, and in too many corners of the world it is but a whispered dream.

If the advocacy of fundamental principles—which by definition are goals perpetually beyond our reach—were not worthy of our effort I suspect the Preamble of the Constitution of the United States would not have dedicated our Nation and its peoples "to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The mere fact that we seek such goals, even if we occasionally stumble, is the very distinguishing characteristic between our Nation and the Communist and other totalitarian regimes which inhabit this Earth.

The U.S. Government, which guided the drafting and ultimate approval of the Genocide Convention, should forcefully reassert its dominance as the world leader of freedom by promptly ratifying the Genocide Convention.

The purpose of this Convention is to establish the commission of genocide as an international crime and, through the enactment of domestic implementing legislation required by the treaty, to make it a crime within each member state. Not only is genocide recognized as a crime by the 96 signatories to the treaty, but under the U.N. Charter and through customary international law, it is generally applicable to all countries. The treaty defines the crime of

genocide, the acts which constitute the crime of genocide and the requisite state of mind of alleged perpetrators of genocide. Because the treaty must be implemented by each individual country, the treaty does not define specific punishments for the crime, but rather obligates each signatory to itself define the crime of genocide consistent with the Constitution of each signatory and to provide for punishment within that country consistent with the Constitution and laws of that country.

As an organization of lawyers, the American Bar Association is particularly concerned about any alleged inconsistency of the treaty with the Constitution of the United States. Following exhaustive study over the past 36 years the American Bar Association has concluded that there simply are no constitutional conflicts posed by the treaty, qualified by President Reagan's understandings and declaration, and that there are absolutely no constitutional or other domestic legal impediments to immediate Senate advice and consent to ratification of this treaty.

Some opponents of the treaty continue to suggest that there is insufficient constitutional authority for the treaty. They are wrong. The Genocide Convention unquestionably is the proper subject for exercise of the treaty power. Article I, section 8, clause 10 provides that Congress has the power to "define and punish Piracies and Felonies committed on the high Seas"—and here I add extra emphasis—"and Offenses against the Law of Nations."

Genocide repeatedly has been associated with aggressive war and totalitarian state behavior in the 20th century. It was the subject of Allied concern in the London Charter, established in the Nuremberg trials after World War II, and has now been the subject of a treaty accepted by 96 nations.

The treaty power under the Constitution is exclusive and explicit. Article II, section 2, clause 2 provides that the President shall have the power, with the advice and consent of the Senate, provided two-thirds of the Senators present concur, to make treaties. Article I, section 10, clause 1 further provides that no state shall enter into any treaty, alliance or confederation. Thus, the treaty-making power of the Constitution is exclusively vested in the President and the Senate, and the several states are explicitly prohibited from entering into a treaty.

Finally—and these things I know are fundamental to you, Senator—finally, article VI, clause 2 provides that treaties shall be the supreme law of the land and that the judges in every state shall be bound by such treaties.

The question has been raised and answered and will be answered again here: under the 1957 holding of the U.S. Supreme Court in *Reid* v. *Covert*, any treaty provision inconsistent with the U.S. Constitution would simply be invalid.

Until 1976 the American Bar Association was of the view that the Genocide Convention "be not approved as submitted" to the Senate in 1949. Over the long history this treaty has been pending before the Senate, various sections and committees of the ABA composed, I submit, of some of the most distinguished constitutional and international law scholars, studied this treaty. The questions which the ABA earlier had raised, however, were addressed in 1971 when this committee approved the three proposed under-

standings and one declaration which President Reagan has endorsed.

The result of subsequent and intense study by the ABA's Section of International Law and Practice and other groups within the ABA resulted in the February 1976 action by the ABA House of Delegates, our policymaking group, calling for Senate advice and consent conditioned on the three understandings and one declaration. It has been over 16 years since that package of qualifying amendments to the treaty's resolution of ratification first was proposed and approved by this committee. During that time there has been no serious suggestion that any additional such qualifiers would improve the treaty, or the ability of the United States under that treaty to bring charges of genocide against foreign perpetrators. This committee has, not in fact, approved any such additional qualifiers.

The first understanding which this committee should again approve clarifies the language in article II of the convention, "intent to destroy in whole or in part," to mean the intent to destroy "in such manner as to affect a substantial part of the group concerned." This understanding merely states the commonsense proposition that genocide is not merely murder—as Senator Javits has noted, it is "murder, and more"—but rather is a crime intended for the mass destruction of a national, ethnic, racial, or religious group. Suggestions that the murder of one person could constitute genocide have been thoroughly explored by the drafters, this committee and the ABA, and are without merit.

The second proposed understanding clarifies the "mental harm" language of article II to mean the "permanent impairment of mental faculties." This understanding is viewed as particularly important by the American Bar Association because it clarifies the well-established constitutional protection of free speech.

Opponents of the treaty have suggested that citizens of the United States would be required to be tried in a foreign country in a forum without the constitutional safeguards afforded by our judicial system.

The third proposed understanding is crystal clear on this point. It states that nothing in article VI "shall affect the right of any state to bring to trial before its own tribunals any of its nationals for acts committed outside the state." This provision assures the full and continued independence of the American legal system and the continued extension of all constitutional guarantees afforded the citizens of the United States.

Finally, the American Bar Association supports adoption of the proposed declaration that the United States "will not deposit its instrument of ratification until after the implementing legislation referred to in article V has been enacted." The criticism of the Genocide Convention as vague on these points overlooks the importance of the required implementing legislation. As with all criminal law statutes in the United States, the implementing legislation must, of course, be consistent with the Constitution of the United States, fully define the crime of genocide for domestic purposes, and prescribe penalties for a conviction of committing of genocide. As a trial lawyer, I suspect I know perhaps better than most the importance of such carefully drawn legislation. Thus, this declaration as-

sures the continued involvement of Congress and the President in implementing the Genocide Convention and it assures that our obligations under that treaty will be met at the time the Convention becomes binding on the United States.

It has been suggested that the Senate give serious consideration to a reservation or other qualifying language to its resolution of ratification concerning the jurisdiction of the International Court of Justice under article IX of the treaty, concerning the "interpretation, application or fulfillment" of the convention, including "the responsibility of a state for genocide or for any of the other acts enumerated in article III." The American Bar Association opposes any such qualifier for a number of reasons.

First, and most important, the United States, as the leader of the free world, should take full advantage of ratification of the Genocide Convention to bring charges against foreign governments who fail to uphold their responsibility to prevent and punish instances of genocide. Were the United States to itself reserve authority under article IX, that reservation could be applied against the United States under the doctrine of reciprocity by a country against whom the United States had brought charges.

Second, it has been suggested that without such a reservation, the United States would be subject to trivial charges before the International Court. This, however, is no reason to adopt such a reservation, since such charges now could be brought before the World Court for propaganda disinformation purposes regardless of whether the court had jurisdiction and regardless of the merits of the charge. It must be said loudly and clearly that the United States has nothing to hide, and that as the bastion of freedom in the world we have no need to erect artificial barriers against the baseless propaganda charges of any foreign government.

Third, to reserve authority under article IX would implicitly suggest to over 90 other countries which have ratified this treaty—and particularly to those who would seek to harm us—that the United States is seriously concerned about baseless charges of genocide against the United States. The United States and its people do not commit genocide. We should be on the offensive in identifying perpetrators of genocide in other countries and in bringing them to the bar of justice.

Fourth, some nations might, as some already have done, fail to recognize United States ratification of the Genocide Convention if such a reservation were approved. The Netherlands and the United Kingdom, for example, both have stated that the reservation to article IX by the Soviet Union so goes to the heart of the purpose of the treaty that they do not recognize that ratification as valid. We should join our allies in rejecting such a reservation as a flimsy crutch for a totalitarian regime. We should not dignify our adversaries' fear of freedom and fear of justice by copying it.

Finally, under customary international law, genocide already is considered a crime. Thus, the United States already is subject to actions concerning genocide before the International Court of Justice under our prior general acceptance of the compulsory jurisdiction of the court. To ratify this treaty without a reservation to article IX would clarify the now vague legal obligation of the United States under customary international law.

The American people and our Government, as we approach the bicentennial of our Constitution, have a proud heritage of freedom and justice unknown previously to mankind. As Ambassador Jeanne Kirkpatrick noted last year, "It is contrary to our national interest to provide fuel" to the Soviet disinformation effort "by failing to reaffirm clearly and unequivocally U.S. support for the important objectives of this Convention. Prompt ratification of this fundamental document is in our best national interest. As then Assistant Attorney General William Rehnquist noted in testimony before this committee, "There are no constitutional obstacles to U.S. ratification."

With utterly no constitutional or other legal impediments to ratification, and with the resulting strengthening of the position of the United States in its fight against totalitarianism, the time for ratification is now.

Thank you, Mr. Chairman, for this opportunity to present the American Bar Association's views. Professor Moore and I would be pleased to answer any of your questions.

Senator HELMS. Thank you very much, Mr. Shepherd. I believe we will have the questions after all have presented their statements.

Professor Rees.

STATEMENT OF PROF. GROVER REES III, UNIVERSITY OF TEXAS LAW SCHOOL, AUSTIN, TX

Mr. REES. Thank you, Mr. Chairman.

I would like to begin by suggesting that as a matter of substance everything that the previous speaker has said about the Genocide Convention, certainly everything that Elliott Abrams said so eloquently this morning, is true. We all ought to be for the substance of the Genocide Convention, at least as the previous speaker interprets it.

The problems that I have are really more questions of procedure, questions of who is going to interpret the Convention and when should we interpret it. Should we wait until later, or should we try to interpret it now with perhaps some more reservations and/or understandings than have already been suggested.

But I do think it's important to emphasize that there are good reasons for ratifying the Genocide Convention, even if you do not believe that it is a safe or a good idea to submit all questions under it to the jurisdiction of the World Court.

First, there is the question of avoiding or doing away with this negative symbolism, which is one of the very reasons that the previous speaker gave that we ought to ratify. It is viewed by much of the world community as shameful that we have not ratified for the last 40 years. And even if we have defenses against that, that is a real fact in the equation, and therefore, it is of political value in our human rights efforts abroad to do away with the stigma of having not ratified the convention, if we can do it, as you say, Senator, consistently with not compromising our sovereignty.

But there is a second reason, and it is a more positive reason. It is that it is a good thing. It ought to be regarded as a good thing to say to the Rafael Lemkins of the world, to the Elie Wiesels of the

world, we are on your side and not on any other side. That we are on the side of human rights.

And sure, those are just words, but they are words that reflect ideas, and it is always important to remember that the law has a teaching function, and that ideas have consequences, that ideas motivate actions. Ninety-five percent, ninety-nine percent probably of the effect of international law rests on the proposition that ideas have consequences, not on the proposition that they can be enforced in a particular tribunal in a particular case.

I do have problems, however, with the Convention, and most of them have to do with article IX, with the idea of an automatic and open-ended submission of all possible interpretations, all possible charges made under the Convention to the World Court's jurisdiction.

It seems to me that the lesson of the *Nicaragua* case ought to be that although the previous speaker is perfectly correct in saying we have nothing to hide, we do not commit genocide, this Convention as we read it does not conflict with our Constitution.

The whole point is that we are not going to be the ones to decide those questions if we submit them to the World Court. That we have nothing to hide says nothing at all about whether we should let the World Court decide whether we have anything to hide; that we do not believe this conflicts with our Constitution says nothing at all about whether the World Court will decide that the Genocide Convention imposes some requirement on nations that conflicts with our Constitution.

Now, some of the administration speakers emphasized that as a matter of domestic law a treaty can have no legal effects that conflict with the Constitution; and that is certainly true. The Constitution insists that it is the supreme law of the land in article VI. And so as a practical matter, it is quite right. In a matter of domestic law, if the World Court were to order the United States to do something contrary to its Constitution, the answer would be no, we will not do it; our Constitution is supreme.

But international law does not recognize that the Constitution is supreme over international law. What you have here is two conflicting systems, two possibly conflicting systems of law, domestic law and international law, each of which insists on its own supremacy over the other. And it is that notion of conflicting obligations that worries me, not the idea that anybody is actually going to be able to take an American citizen away, but precisely because I do take seriously the notion of international law, a corollary of that seems to be that you do not go around committing to possible conflicts. You do not commit yourself to something you may not be able to carry through.

In 1946 when the U.S. Senate was considering accession to the general compulsory jurisdiction of the World Court, several nationalist Senators said look, are they not maybe some day going to issue some decisions that are contrary to our fundamental national interests? And their internationalist colleagues tended to say well, probably not, and in any case, we can always walk away. In any case, they do not have any enforcement jurisdiction, and we can always walk away.

Well, it seems to me that those Senators had it exactly backwards, that the whole idea of commitment to a rule of law means that you commit in advance only to that to which you really can commit, and that is why it is not enough to say that we do not interpet this as in conflict with our Constitution. We should only commit to the World Court's jurisdiction if we are satisfied that the World Court is unlikely to construe the Constitution or that it is impossible that the World Court will construe the convention inconsistently with our Constitution. I do not think that that affirmation could be made, particularly after what they did to the friendship, commerce and navigation treaty that we had with Nicaragua, which of course had nothing to do with mining of harbors or with jurisdiction to decide cases involving mining of harbors.

I should add that, in answer to two of the specific objections to an article IX reservation raised by a previous speaker, or one of the specific objections, that there is at least one difference between the current situation where any nation, it is true, can raise any question in the World Court that it wants to about our violation of any customary international norm—and certainly the rule against genocide is one of those.

But if those have to do with anything we consider our domestic jurisdiction, if somebody said, for instance, that a bilingual education program violated, or failure to have bilingual education violated the principle of genocide because it was designed to destroy some minority group as such, if we consider that within our jurisdiction, under the Connally reservation we can simply opt out, whereas under the Genocide Convention it would not be subject to the Connally reservation.

So that is one very practical difference. But I do not think it begins to deal with the problems that we could get into if we committed to the jurisdiction of the World Court.

However, I would like to deal briefly with three or four other problems I have with the convention itself, and they are just ambiguities. I am not suggesting that the Convention actually means the things that I suggest it might be construed to mean. But it seems to me that, whether or not we commit to the jurisdiction of the World Court, we should also decide in advance, or the Senate should decide in advance, exactly what it means by certain of the phrases in the Convention that I do think are ambiguous.

Two of the suggested reservations that I have, or understandings, are really just strengthened versions of the ones the State Department has already proposed. But there is a third one that deals with different questions.

The first general question that I think needs to be addressed is the question of mental harm, and I think that the State Department has, of course, recognized that "mental harm" is a vague term and that it could conceivably be construed to mean psychological harm resulting from unfortunate conditions.

Their suggested understanding is that it needs to say "permanent impairment of mental faculties." While I think that is well intentioned, I do not think it does what they are trying to make it do.

For instance, the U.S. Supreme Court in *Brown* v. *the Board of Education* suggested that school segregation "generates a feeling of

inferiority" as to their status, that is black children's status in the community, "that may affect their hearts and minds in a way unlikely ever to be undone."

Well, that permanence, which is the only new element being introduced by the suggested State Department reservation, therefore could be construed to affect the psychological harm done by school segregation or by any other institution that imposed psychological injury on people. Therefore, I have suggested a somewhat more tighly worded, in my view, reservation or understanding, which would suggest that, in addition to being permanent, there has to be some physical impairment of the brain.

This in my view is not at all inconsistent with what the intentions of the drafters of the Genocide Convention were. The Indian and Chinese delegations wanted to deal with things like torture and drugs. They did not want to deal with things like psychological injury.

And yet, I think it better states the understanding, and I do not think we should rely exclusively on the intentions of the drafters in international law, any more than we should in constitutional law, to ensure that there will be no contrary court decision.

The second area is the question of intent. Now, I have read several times in State Department testimony and heard this morning the idea that the Genocide Convention requires specific intent to destroy a group. And indeed, this morning, if I had not known better, I would have thought that was a direct quote from the Convention.

But the Convention does not say anything about specific intent. It says "intent" and of course "intent" could conceivably mean general intent. That is, not that you did something in order to destroy the group, but that you did something knowing that it was likely to destroy the group. As Justice Stevens said in his concurring opinion in *Washington* v. *Davis:*

> Frequently the most probative evidence of intent will be objective evidence of what actually happened, rather than evidence describing the subjective state of mind of the actor, for normally the actor is presumed to have intended the natural consequences of his deeds.

In other words, if it could be shown that a particular program of the U.S. Government, for instance failing to provide a certain standard of health care, was resulting in higher death rates among minority groups or lower birth rates among minority groups than among the general population, and if that was called to the attention of the Government and we did not change those policies, it could be argued that we had an intent, although not a specific intent perhaps, to destroy that group.

A self-constituted war crimes tribunal which found Israel guilty of genocide, although they were cagey about whether that was genocide under the Convention or just genocide as a matter of customary international law, based its finding on this very standard of intent, this general rather than specific standard of intent.

The commission, which included at least one very prominent international law scholar, Richard Falk, held that:

> Governments rarely, if ever, declare and document genocidal plans in the manner of the Nazis. It is from the effect of governmental policies and on occasion articulated reasons for particular behavior that intent and objective can be identified.

Therefore I think it is very important to have a reservation, or at least an understanding, saying that specific intent to destroy the group is what is required. Again, I think that is what the drafters of the Genocide Convention intended. I just think we ought to make it clear.

Similarly, I believe we ought to make it clear that the ambiguous language "to destroy the group as such" does not mean just to assimilate the group into the general population, that "destroy the group as such," except in the cases of sections (d) and (e) of article II, which deal with reducing births within the group or transferring children within the group, except in those cases, I think we should make it clear that intent to "destroy the group as such" has to involve causing the deaths of a substantial number of members of the group.

Again, I think that is perfectly consistent with the Genocide Convention as it was originally intended. I just think it is safest and the best course to make it clear.

Both of these intent understandings I have put into one understanding, which also does what one of the current state understandings does, which is to make it clear that the intent has to be carried out in a way that affects a substantial number of members of the group. So that can be viewed as just a strengthening of the State Department's intent understanding.

Now, the final understanding or reservation that I have suggested would deal with the question of international obligations that may conflict with constitutional obligations. As the previous speakers have all pointed out, there is no way that an international obligation that interferes with a constitutional obligation can be made the law of the land domestically within the United States.

But in order to make it crystal clear to the other signatories that we do not intend to incur any international obligations, either, that conflict with our constitutional law, I have suggested a reservation or understanding to that effect. Just to give one example of how this could happen, it could be that the World Court in a future case or that some other tribunal construing the convention could decide that the definition of "incitement" that has to be prohibited by the Genocide Convention covers some things that our Supreme Court would hold, on the other hand, are protected under the first amendment.

If you have two different supreme tribunals interpreting the same language, you can easily get two different results. And in that case we would have an international obligation to comply with the international standard and to punish people for incitement to genocide, even though that very speech might be protected under our own Supreme Court's holdings about what the first amendment protects. And this reservation or understanding is simply designed to get at that.

Now, I have one final observation, which is about whether it is really safe to call our clarifications understandings. While it is the traditional practice at least of the United States to call something an understanding if we think that it does not change the legal effects of the treaty, and while the Vienna Convention on the Law of Treaties, which we said in 1965 does restate customary international law in most respects, does support that distinction: It is a reser-

vation if you think it varies—if you purport to vary the legal effects; it is an understanding if you do not.

There is a possible danger in calling these things understandings and in saying that we do not believe that they vary the effects of the treaty, which is that if the World Court should decide that we were wrong and that they really do vary the effects of the treaty, then by not making them reservations, by not submitting them to the procedure requiring other nations' explicitly to accept them or to reject them, they simply become unilateral interpretations which the court is free to disregard.

And although I think the Vienna Convention is somewhat confusing on this point, it might be best to say that we ratify subject to the condition that this is what the treaty means. In other words, we would be saying to the world: We do not think we are changing the real meaning of the treaty; we think it is just an interpretation and just a clarification. But in the event that another tribunal should decide otherwise, then we want it to have the effect of a reservation and we are putting you on notice in advance about that.

That is all I have, Senator.

[Mr. Rees' prepared statement follows:]

PREPARED STATEMENT OF GROVER REES III

(Grover Rees III is Assistant Professor of Law at the University of Texas Law School. This testimony is based in substantial part on Rees, The Genocide Convention and the Lesson of Nicaragua, National Review, Feb. 8, 1985.)

This statement addresses some of the constitutional and foreign policy problems that could result from unreserved ratification of the Genocide Convention. Almost all of these problems are corollaries of the central flaw in the Convention: it would commit the United States, in advance and with no exceptions or opportunities for withdrawal, to accept and implement whatever consequences the International Court of Justice [1] might deem to flow from a provision that was vague in 1948 and has been becoming vaguer ever since.

This automatic and open-ended submission to the World Court's jurisdiction could generate international obligations that conflict with constitutional obligations in two kinds of situations: when the World Court construes the Convention in a way that violates some specific constitutional prohibition, and when the Court takes jurisdiction over a matter that the Constitution requires to be decided by some branch of the United States Government without delegation to another body.

Even a slight chance that ratification of the convention could give rise to conflicting international and constitutional obligations is a powerful argument for ratifying subject to reservations that would prevent such conflicts. But the possibility of conflict between a World Court judgment and the Constitution is not the only danger. It is even more likely that conflicts would arise between the obligations of the United States (as construed by the World Court) and fundamental national interests other than those expressly protected by the Constitution. Moreover, insofar as the Constitution imposes on the President and on members of Congress the obligation to perform the functions of their offices in conformity with the national interest as they perceive it, the commitment in advance of the supervision of these functions to an agency independent of the United States is itself a conflict of obligations of constitutional dimension.

I. CONFLICTING OBLIGATIONS: THE LESSON OF NICARAGUA

It is important to concede at the outset a point made frequently by proponents of ratification: that the Genocide Convention is not unique in presenting the possibility that the United States might be forced to choose between ignoring its international obligations and violating its own Constitution or fundamental interests. The possibility of such conflict is inherent in the idea that two systems of law, neither of which regards itself as subordinate to the other, can impose obligations on the same

[1] Hereinafter "World Court" or "Court."

subjects. Moreover, as long as the President, the Members of Congress, and the Justices of the Supreme Court can be expected to obey their oaths to uphold the Constitution, they can be expected to choose the "lesser evil" of refusing to enforce World Court judgments that they believe to conflict with the Constitution. The Supreme Court "has regularly and uniformly recognized the supremacy of the Constitution over a treaty." *Reid* v. *Covert*, 354 U.S. 1, 16 (1957). But this is hardly a reason for nonchalance with regard to new and potentially fruitful sources of conflicting obligations, as the World Court's recent assertion of jurisdiction in the Nicaragua case [2] should have taught us.

Nicaragua affords a depressing illustration of what can happen when the United States incurs international obligations with insufficient regard to the practical consequences. Although there is some evidence that in adhering to the Statute of the World Court the United States never intended to give the Court jurisdiction over cases involving armed conflicts in which fundamental national interests are at stake,[3] we failed to make this clear enough to avert the Court's assumption of jurisdiction. Assuming for the sake of argument that the Court is correct in its construction of the Statute, a good case can nevertheless be made that the United States cannot submit to jurisdiction without violating the Constitution. However desirable it might be to give supervisory authority over the warmaking power of the United States to a panel of distinguished jurists of various nationalities, the Constitution provides a different scheme: Articles I and II allocate the power between Congress and the President, and Article III requires that controversies over its exercise be finally resolved by the Supreme Court of the United States.

Constitutional problems aside, it would be bad for the United States and bad for the world if any international body were to be given a veto power over American responses to the activities of nations such as the Soviet Union, Libya, Cuba, and Nicaragua without being able to exercise a similar power over the foreign relations of these nations themselves. It is, at least for the present, impossible for any tribunal to exercise such power, not only because most Communist nations expressly reserve the right to decide whether and how World Court judgments will apply to them,[4] but also because these nations generally conduct their activities in ways that would prevent a court from collecting and analyzing evidence. In the Nicaragua case, for instance, the only defense available to the United States on the merits is that our activities are necessary responses to covert Nicaraguan aggression against other Central American nations. The Nicaraguan Foreign Minister, however, has denied under oath that his nation has given any assistance to guerrilla movements seeking to overthrow these nations.[5] To submit the matter to the jurisdiction of the World Court is to condition the United States response not on whether Nicaragua is lying, but on the very different question whether the United States can prove to the satisfaction of the World Court that Nicaragua is lying.

Similarly, a committee of the American Bar Association has produced a report finding that the United States violated numerous rules of international law in invading Grenada.[6] If this controversy were submitted to the World Court it is very likely that the Court would agree with the ABA committee. Indeed, it is quite possible that the Court would find the invasion of Grenada illegal and the Soviet invasion of Afghanistan legal—in part because it is easier for a nation to comply with the forms of international law when it has helped to bring a situation into existence than when it is reacting to the initiatives of others. The distinctions between the

---

[2] Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States), Jurisdiction of the Court and Admissibility of the Application, Judgment, 26 November 1984.

[3] The floor leader of the accession resolution, Senator Thomas, assured his colleagues that the World Court would respect a distinction between the kinds of controversies it could entertain ("differences of a legal or justiciable nature") and those reserved to the Security Council ("disputes of a political character"). 92 Cong. Rec. 10614 (1946) (statement of Senator Thomas). It is important to remember that this was the heyday of the United States Supreme Court's "political question doctrine," which drew a similar distinction between "political" and "justiciable" questions and which (at least prior to the narrowing of the doctrine in *Baker* v. *Carr* and *Powell* v. *McCormack* during the 1960's) would have placed all questions about the legality of an armed conflict in the latter category. Moreover, proponents of accession repeatedly assured their colleagues that if the World Court ever did exceed its jurisdiction (as that jurisdiction was understood by the United States) the United States could simply walk away from a Court decision, since the only way to enforce a Court order would be by appeal to the Security Council, on which the United States would retain a veto. See, e.g., Id. at 10623 (statement of Senator Wiley); Id. at 10687-91 (statements of Senator Morse); Id. at 10694 (statement of Senator Pepper).

[4] See, e.g., Lissitzyn, International Law Today and Tomorrow 61-63 (1965).

[5] See *Nicaragua* v. *United States*, Preliminary Judgment on Jurisdiction and Admissibility.

[6] Report by the American Bar Association Section on International Law, 1984.

two cases that favor the United States, on the other hand, involve evidence that is not likely to be given serious consideration in an international court, either because it is too ephemeral or because it is too prejudicial to certain kinds of governments. The World Court would be unfaithful to its charter if it took judicial notice of the fact that the Soviet Union lies a lot, and it would lack manageable standards to distinguish the Grenadians' baking of cakes for invading Marines from formally identical displays sponsored by the Afghan-Soviet Friendship Committee. Yet any nation that ignores such facts and distinctions in formulating its foreign policy does so at its peril. It would therefore seem at least as irresponsible for the President to give final authority over the foreign policy of the United States to the World Court as it would be for him to delegate similar power to the American Bar Association.

Despite the manifest undesirability of submitting controversies such as Grenada and Nicaragua to the World Court, however, and even despite the possibility that such submission might violate the Constitution, we put ourselves in an unfortunate light by not making it crystal clear from the outset that we would never do so. The charges of "lawlessness" that have been leveled at the United States as a result of our withdrawal from the Nicaragua case—even though emanating mostly from the same quarters that urged adherence to the Statute of the Court on the ground that the Court lacks enforcement jurisdiction and could therefore never really interfere with our fundamental national interests[7]—will sting, and will constrain the future foreign relations of the United States in a number of undesirable ways. If nothing else good comes of the Nicaragua case, it should at least teach us the folly of writing anything that looks even vaguely like a blank check to the World Court. And the very last power we should give the Court is the power to declare finally and authoritatively that some facet of our foreign or domestic policy is "genocide" within whatever construction the Court may come to give the term.

II. THE VAGUE AND EXPANDING DEFINITION OF GENOCIDE

Much of the support for ratification of the Genocide Convention has been generated by the association of the word "genocide" with the Nazi Holocaust, and by the resulting misapprehension that the Convention would do nothing but to prohibit certain kinds of mass murder. On the contrary, four of the five types of "genocide" listed in Article II of the Convention could be accomplished without the killing of a single person.

As one scholar who is an ardent supporter of the Convention has recently conceded, "the vague wording in some sections" of the Convention has caused the term genocide to be "applied . . . to the wrong phenomena."[8] These phenomena have included past and present United States policies deemed to have adverse effects on the birth rates, death rates, or distinct racial identity of indigenous minority groups;[9] United States support of birth control programs in Third World nations;[10] police campaigns against the Black Panthers;[11] the conduct by the United States of the war in Indochina;[12] and Israeli policies toward the Palestinians on the West Bank and in Lebanon.[13] These allegations are not the ravings of diehard opponents of the Convention; on the contrary, they emanate from the Third World leaders, international lawyers, and social scientists who have been among the Convention's principal supporters and who can be expected to be most involved in the future development of its interpretation. Moreover, the broad language of the Convention's definition of genocide lends itself quite readily to these allegations.

(A) "Mental harm"

Article II of the Convention defines genocide to include "[c]ausing serious bodily or mental harm to members of the group." (Emphasis added). The State Department and the Senate Foreign Relations Committee, recognizing the potentially broad scope of the term "mental harm," have suggested that the United States ratify the Convention subject to a unilateral "understanding" that would limit the definition

---

[7] See, e.g., sources cited in note 3, supra.

[8] J. Porter, "Introduction: What is Genocide? Notes Toward a Definition," in Genocide and Human Rights: A Global Anthology, 2-32, at 9 (1982).

[9] See Id. at 9-10; W. Patterson, ed., We Charge Genocide. The Crime of Government Against the Negro People (1961); R. Weisbord, Genocide: Birth Control and the Black American (1975).

[10] See Porter, supra note 8, at 9; S. Ex. Rept. 98-50, 98th Cong., 2d Sess., Sept. 24, 1984 [hereinafter cited as Report]

[11] See Report, supra note 10, at 9.

[12] Id.

[13] See e.g., Israel in Lebanon: The Report of the International Commission to enquire into reported violations of International Law by Israel during its invasion of Lebanon. (1982).

of mental harm to "permanent impairment of mental faculties." [14] For the reasons suggested in section IV of this statement, I believe that an "understanding" (as opposed to a reservation) is insufficient to prevent a World Court interpretation that would include various kinds of psychological injury without proof of physical impairment of the brain.

A broad definition of mental harm would be consistent not only with the language of the Convention but also with holdings of the United States Supreme Court in related contexts. In *Doe* v. *Bolton*, 410 U.S. 179 (1973), the Supreme Court held that the decision whether a woman's mental health was threatened by a pregnancy should be made "in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." And in *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Court cited the testimony of social scientists for the proposition that school segregation "generates a feeling of inferiority as to [black children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Such psychological harm was deemed relevant to the question whether school segregation violated the fourteenth amendment to the Constitution—which, unlike the Genocide Convention, does not even contain explicit reference to "mental harm." There will be no shortage of social scientists presenting evidence to the World Court that various policies of the United States and other Western nations impose serious mental harm on members of protected groups. Indeed, such mental harm may amount to "permanent impairment of mental faculties," as the Supreme Court found it to do in *Brown*, even though it is purely consequential—rather than being imposed directly by drugs, torture, surgery, or the like—and has no obvious physical manifestation. So it is by no means certain that a unilateral United States understanding would have a significant limiting effect even if the World Court were to take it into account in interpreting the Convention.

(B) Destruction of the group "as such:" Cultural genocide

Imposition of mental harm, like the other acts prohibited by the Convention, is defined as genocide only if it is done with "intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such." (Article II). The degree of intent required—"specific" or "general"—is discussed in section II(C) below. It is important to notice, however, that the kind of intent required is to destroy the group "as such." This requirement could be held to have been satisfied even if there is no intention to kill anyone. Specifically, the intention to assimilate a minority group into the cultural mainstream in a way that causes a loss of ethnic identity would satisfy this requirement in at least some cases (although it might or might not satisfy the other requirement of Article II, which is that the intention be manifested in one of the five kinds of prohibited acts.)

The original draft of the Genocide Convention expressly included a broad prohibition of "cultural genocide," defined to include acts such as the prohibition of a group's language in schools and the destruction of a group's cultural institutions with the intention to destroy the language or culture.[15] The representatives of Western nations in the United National General Assembly objected to the inclusion of cultural genocide.[16] The result was a compromise that eliminated the general and express prohibition of cultural genocide, but specifically included one form of cultural genocide (transferring children of one group to another group in order to destroy the group "as such," although without killing anybody or reducing the number of biological members of the group), and also imposed the ambiguous "causing mental harm" provision discussed above, which could be construed to include almost any act of cultural genocide.[17] Another "catch-all" provision, "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," seems less likely to be construed to include acts that caused the destruction of a group "as such" without causing the death of any particular members of the group, although it can be argued that the disintegration of the group constitutes its physical destruction.[18]

---

[14] See Report, supra note 10, at 2.
[15] See Kuper, supra note 12, at 30-31.
[16] See Id. at 31 and N. 35, and sources cited therein.
[17] See Kuper, supra note 12, at 31.
[18] See, e.g., Hearing before the Committee on Foreign Relations, United States Senate, 98th Cong., 2d Sess., on the Convention on the Prevention and Punishment of the Crime of Genocide, September 12, 1984, at 13 (testimony of Senator Ervin) [Hereinafter cited as Hearing].

It is probable that the majority in the General Assembly did not contemplate the prohibition of cultural genocide other than the transference of children, and the residual ambiguity in Article II has been blamed on bad drafting.[19] Although negotiation history is an important source of treaty interpretation, in my judgment it would be foolish for the United States to rely on "the intentions of the framers" as its only safeguard against a broader interpretation by the World Court at some time in the future. Whatever some members of the General Assembly thought it was doing, what it actually did was to proscribe all acts that cause "serious mental harm" with the intention of destroying a protected group "as such." A court need not be blinded by ideology to give these words their most straightforward meaning. The most obvious consequences of such an interpretation would be for government policies that require the use of English in schools and other public institutions in order to assimilate minority group members into the culural mainstream. The consequences are potentially far broader, however, since almost every practice or institution that does not affirmatively accommodate minority cultures tends inevitably to assimilate and thus destroy them, often causing mental harm to members of minority groups in the process. Whether the mere failure to accommodate minority cultures would be held genocidal on the ground that it causes mental harm and is "intended" to destroy the group as such would depend on whether the World Court holds that nations "intend" the predictable consequences of their actions and omissions.

(C) "Intent" and disparate impact

Proponents of the Convention have testified before the Senate Foreign Relations Committee that the Genocide Convention requires "specific intent" to destroy a group. The Convention itself, however, is silent on the question whether the intent required is "specific," or whether a "general" intention--that the accused must have adverted to the consequences of his actions—is sufficient. Scholars have argued that general intent should be sufficient;[20] supporting this argument is the elimination by the General Assembly of the word "deliberate" in the phrase that originally read "deliberate acts committed with the intent to destroy . . ."[21] (The State Department's first proposed understanding would stipulate that the "intent to destroy" the group must be manifested "in such a way as to affect a substantial part of the group concerned." This has no bearing on whether intentions may be inferred from actions. Rather, it is meant to exclude matters such as isolated lunchings, where the perpetrators may specifically intend to destroy the group but do not carry out their intentions in a way that affect large numbers of people.)

Jean-Paul Sartre, testifying at a mock war crimes trial of the United States was guilty of genocide whether or not it specifically intended the termination of the Vietnamese race in whole or in part. Sartre argued "that the genocidal intent was implicit in the facts, and those who fight the war of the greatest power on earth against a poor peasant people 'are living out the only possible relationship between an over-industrialized country and an underdeveloped country, that is to say, a genocidal relationship implemented through racism . . .'"[22] Sartre's argument, shorn of its passion, is no different from that of Justice Stevens concurring in *Washington* v. *Davis*, 426 U.S. 29 (1976):

"Frequently the most probative evidence of intent will be objective evidence of what acutally happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."

If the World Court were to adopt a "general intent" standard for genocide, the United States could be held liable for any social policies or programs that are found to have a disparate impact on the birth rates, death rates or "racial integrity" of minority groups. At the very least, such a showing would place on the United States the burden of showing that it did not intend these consequences. If the World Court were to adopt a style of analysis similar to that of the Supreme Court in *Davis*, such a showing would take the form of a demonstration that the government had acted to pursue some racially neutral and otherwise permissible purpose and that the disparate impact on the minority populations was an incidental effect.[23]

---

[19] See, e.g., P. Drost, The Crime of State: Genocide 119-21 (1959).

[20] See, e.g., I. Horowitz, Genocide: State Power and Mass Murder 35 (1976); Kuper, supra note 12, at 35-36; Bedau, supra note 12; Israel in Lebanon, supra note 13.

[21] See L. Kuper, supra note 12, at 33.

[22] Quoted in L. Kuper, supra note 12, at 35.

[23] "A prima facie case of discriminatory purpose may be proved as well by the absence of Negroes on a particular jury combined with the failure of the jury commissioners to be informed of

Continued

There is no reason, of course, to assume that the World Court would be as permissive as the United States Supreme Court in allowing the government to explain away disparate impact on minority group death rates as "incidental" and therefore unintended. Even if the World Court did adopt such a test, however, it is possible that many United States policies would fail. This is because the United States would be unable to show that these policies, aside from their disparate racial impact, were consistent with international law.

For instance, the International Covenant on Economic, Social and Cultural Rights, to which the United States is not a party but which purports to define the general standard for what is required by "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family," provides a broad range of affirmative obligations to provide "the highest attainable standard of physical and mental health," opportunities "to take part in cultural life," and "periodic holidays with pay." A nation whose policies resulted in high death rates among minority groups, even if it had not acceded to the Convention on Economic, Social and Cultural Rights, could be held to have been put on notice by this Convention that falling below the standards set therein is a violation of international law. The international community having declared that failure to provide the highest level of health care falls below the minimum standard of human dignity owed to every human being, a nation could hardly be heard to assert its sovereign right to provide only such health care as it desires in mitigation of its higher mortality rate among blacks than among whites.

By a similar analysis—analogous to the strict scrutiny employed by the United States Supreme Court whenever there is disparate impact in the distribution of a "fundamental right"—the World Court could incorporate the terms of other human rights treaties to which the United States is not a party. If a policy of the United States could be shown to result in a higher death rate, lower birth rate, or other tendency to destroy a protected group, failure to comply with other standards of international human rights law might well be fatal to our efforts to rebut the presumption that we intended the "genocidal" consequences of the policy. Although the World Court might not otherwise have jurisdiction to adjudicate our violations of these standards, it would effectively acquire such jurisdiction in all cases where disparate racial impact gave rise to a claim under the Genocide Convention.

This analysis of the possible incorporation of other human rights laws into the Genocide Convention in cases where disparate racial impact gives rise to a presumption of genocidal intent is necessarily speculative. It has a precedent, however, in the doctrine that the Universal Declaration of Human Rights—a broad and detailed provision to which a number of nations declined to agree—is a "definitive" interpretation" of the briefer human rights provisions of the United Nations Charter, to which many nations agreed precisely because they did not go as far as the Declaration.[24] This sequence of moves should be quite familiar to students of United States constitutional history. In determining what kinds of mental harm and what conditions of life are intended to bring about destruction of protected groups, it is in my judgment not at all unlikely that the World Court will have reference to other human rights conventions that purport to define the rights without which groups and individuals will find life hardly worth living. The ultimate effect of this process would be the incorporation into the Genocide Convention of what one social scientist has called the "shadowy area of genocide that permits the state to take lives by indirection, for example, by virtue of benign neglect, or death due to demographic causes." [25]

(D) The finding of genocide against Israel

It is ironic that among the most frequent charges of genocide during the postwar period have been those against Israel. The recent report of a self-constituted commission of inquiry,[26] whose president was a Nobel Peace Prize winner [27] and whose

---

eligible Negro jurors . . . With a prima facie case made out, 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.'" *Washington* v. *Davis*, 426 U.S. 229, (1976) (opinion of the Court).

[24] See L. Sohn & T. Buergenthal, International Protection of Human Rights 518-19, 532 (1973), and sources cited therein.

[25] I. Horowitz, supra note 20, at 35.

[26] Israel in Lebanon, supra note 13. See especially 194-97 ("Majority Note on Genocide and Ethnocide").

[27] Sean McBride of Ireland (also a winner of the Lenin Peace Prize).

vice president was one of the world's leading authorities on international law,[28] offers a glimpse at some of the uses to which the Genocide Convention can be put. The majority of the members of the commission found Israel guilty of "the deliberate destruction of the national and cultural rights and the identity of the Palestinian people and that this constitutes a form a genocide." [29] Although the commission conceded that "[t]he particular form of genocide as applied to the Palestinians does not appear to be aimed at killing the Palestinians in a systematic fashion," [30] it emphasized that "the notion of genocide was never meant to cover simply the physical extermination of a people." [31]

The commission, without holding directly that Israel intended the massacres by Lebanese partisans at the Sabra and Chatila camps, nevertheless found that "these massacres were only the culmination of a pattern of warfare carried out against the Palestinian and Lebanese people in Lebanon, especially those resident in the camps." [32] In finding Israeli complicity in physical genocide, the commission was aided by its adoption of the general intent standard rather than that of specific intent:

"Governments rarely, if ever, declare and document genocidal plans in the manner of the Nazis. It is from the effect of governmental policies and, on occasion, articulated reasons for particular behaviour, that intent and objective can be identified." [33]

There is a studied ambiguity in the commission's attitude toward the connection between "cultural genocide" and the Convention. Although conceding at the outset that the "formal legal basis of the crime of genocide is that provided for by the United Nations Genocide Convention," [34] and that the final draft of the Convention was apparently intended to exclude cultural genocide, the report goes on to state that "[i]n contemporary writing and attitudes, cultural genocide or 'sociocide' is increasingly playing a prominent part." [35] It adds that "[i]n any event, Israel is in breach of the Hague Convention for the Protection of Cultural Property." [36] Finally concluding that the behavior constituting the breach of the Hague Convention also "constitutes a form of genocide." [37] Whether this form of genocide has been reconciled to the "formal legal basis" for punishing genocide as a result of the developments in contemporary scholarship or by the incorporation of the standards in the later Hague Convention, or whether the commission regards cultural genocide as outside the scope of the Genocide Convention itself but within a "penumbra" of related international crimes, is not made clear.

III. THE COMPULSORY JURISDICTION OF THE WORLD COURT

Article IX of the Convention commits to the World Court all controversies relating to its interpretation of application. The 1984 report of the Foreign Relations Committee gives several reasons for concluding that this commitment is unlikely to cause problems for the United States.

The first reason is that the Court "has no enforcement powers."[38] This is apparently another way of saying that the United States would retain the physical power to disobey an order of the Court, thus violating the very international obligations that the proponents of unreserved ratification are now urging us to undertake. Alternatively, it may mean that the Foreign Relations Committee intends to reserve for the United States the right to disobey orders of the Court without violating Article IX. Either of these arguments is an odd one to be making just now. The Nicaragua case suggests that there are definite costs in disobeying—even in being regarded as disobeying—international obligations. It also suggests that in the absence of an explicit reservation of the right to reject the Court's jurisdiction, the Court will assume no implicit reservations.

The committee's second argument—that only states, not groups or individuals, can bring actions before the World Court [39]—is perhaps even odder than its first

---

[28] Professor Richard Falk of Princeton University.
[29] Israel Lebanon, supra note 13, at 197.
[30] Id. at 194.
[31] Id.
[32] Id. at 196.
[33] Id. at 194.
[34] Id. at 195.
[35] Id. at 196.
[36] Id.
[37] Id. at 197.
[38] Report, supra note 10, at 16.
[39] Id.

argument. Ninety-six states, including Nicaragua, are parties to the Convention, and any of them (other than the handful that have entered reservations to Article IX) could invoke the compulsory jurisdiction of the Court in proceedings against the United States.

The third argument is that the World Court is "moribund," [40] and therefore will presumably construe the Convention in narrow and unthreatening ways. This argument ignores the dynamic nature of law and legal institutions, and particularly the explosion of international human rights law during the last 20 years. Perhaps even more importantly, it ignores the possibility that the Court has been relatively uncreative in its decisions precisely because it has relatively little compulsory jurisdiction. A court whose jurisdiction depends on the consent of all parties to each case has a strong incentive to retain the trust of its constituents by rendering decisions within the range defined by their settled understanding of the law.

The concept of genocide has become the intellectual property of social scientists, legal theorists and national groups whose impulses tend toward expansion rather than contraction.[41] In the words of one scholar, genocide is "enjoying currency as a loosely applied label to stigmatize all kinds of official and unofficial measures." [42] Those who argue for more expansive definitions of genocide—not only for the inclusion of cultural genocide and for a relaxed intent standard, but also for the inclusion of new types of protected groups, such as political minorities and homosexuals—frequently do so outside the context of the Convention itself. It does not follow that the scholars and the World Court, relieved of the constraint imposed by the non-ratification of the world's most powerful nation (and the preferred target of many international human rights activists), would not update the Convention to keep up with the frontiers of scholarship and ideology.

The Foreign Relations Committee's assurance that the World Court is "moribund" has the flavor of Alexander Hamilton's statement, fourteen years before *Marbury* v. *Madison*, that the federal judiciary would possess "neither force nor will," [43] and that the Federal Government would pose no threat to the "sovereignty" of the States.[44] One can, moreover, be glad that Hamilton was wrong in the case of the United States and yet hope that the lesson will not be repeated on a larger scale.

Finally, the committee points out that other treaties already commit the United States to the World Court's jurisdiction in certain cases.[45] Aside from suggesting that the Nicaragua case ought to give rise to the careful reconsideration of the wisdom of any such submission, it is important to point out the following distinctions between the Genocide Convention and the treaties cited by the committee: (1) Almost all involve terms and doctrines carefully defined by the treaties themselves or by customary international law; (2) Almost all concern subjects, such as foreign commerce, that do not bear so directly on fundamental national interests as many applications of the Genocide Convention would do; (3) Many concern subjects such as boundary disputes and fishing rights, on which adjudication would be based primarily on objective evidence rather than on the representatives of the parties, so that totalitarian nations have no special advantage. In these cases the dangers of submitting to compulsory jurisdiction are much less, although there may be constitutional problems in cases where the Court decides contrary to domestic law or takes jurisdiction of a matter reserved by the Constitution to some branch of the United States Government.

IV. OTHER OBJECTIONABLE PROVISIONS

The general dangers discussed above—that unreserved ratification would give the World Court the power to impose on the United States international obligations in conflict with the Constitution or with sound policy—subsumes most of the particular objections that have been made by others. I should comment briefly, however, on the inadequate answers given by proponents of ratification to three of these objections:

(A) "Incitement" and the first amendment"

Article III includes "incitement to genocide" as a crime punishable under the Convention. The Foreign Relations Committee suggests that there is no potential

---

[40] Id.

[41] See generally Porter, supra note 8, and sources cited therein at 26–32. See also Israel in Lebanon, supra note 13.

[42] See Porter, supra note 8.

[43] The Federalist No. 78.

[44] Id. No. 33.

[45] Report, supra note 10, at 16.

conflict with the First Amendment, because the Supreme Court has construed the First Amendment to permit punishment of some kinds of "incitement."[46] The danger, however, is that the World Court—which would have the final authority to define the international obligation of the United States to punish incitement to genocide—would draw the line between "incitement" and other speech in a different way than the United States Supreme Court draws the line between the "incitement" that may constitutionally be punished and the "advocacy" that is protected by the First Amendment. This would create a conflict: in a given case the United States might be obliged under the Genocide Convention to punish certain speech, and obliged under the Constitution not to punish it. Neither the committee report nor the State Department's testimony addresses this possibility.

(B) Extradition

The State Department's legal advisor has suggested that the genocide treaty would not create an obligation to extradite American citizens to face "trumped-up charges" of genocide abroad.[47] This, he said, was because of the "careful definition of genocide contained in the Convention" and also because the United States would only be obliged to extradite people to nations with whom it had extradition treaties.[48] Leaving aside the question whether the definition of genocide is as "careful" as it might be, this reassurance again overlooks the fundamental question, which is not whether the Convention would somehow physically force the United States to violate the Constitution—it would not—but whether it would create international obligations that conflict with the Constitution or with the national interest. Senator Ervin argued in 1970 that the Convention would obligate the United States to conclude extradition treaties with all parties to the treaty.[49] It is true that until we concluded such treaties no one could be extradited. But if we declined to do so, Senator Ervin contended, we would be violating our obligation to give effect to Article VI of the Convention, which requires persons charged with genocide to be tried either in the state in which the act was committed or by an international penal tribunal.[50] (The State Department's third understanding affirms that the United States would also have the right to try its own nationals for genocide committed abroad. This understanding, assuming it was regarded as binding by the World Court, would not affect any obligation imposed by the Convention to conclude extradition treaties.)

Although I am not so sure as Senator Ervin that the Convention imposes a duty to conclude extradition treaties—Article VII requires that parties extradite" in accordance with their laws and treaties in force," which might defeat the presumption of a duty to conclude new extradition treaties derived from the general obligation to effectuate the Convention—neither the State Department nor the Foreign Relations Committee seems to have answered it.

I would also note that in cases where we do have treaties, the assurance that our citizens need not be extradited to face "trumped-up charges" is an argument that proves too little. A more troublesome problem is whether we would be obligated to extradite our citizens to face trial for acts which our own courts have not interpreted to be "genocidal" but which the courts of some other nation, without grossly misconstruing the Convention, do regard as genocide. Although the answer to this question would seem to be affirmative, I would be interested to hear the opinion of the State Department, which thus far seems to have addressed only the question of "trumped-up" or politically motivated charges.

(C) The International Criminal Court

Opponents of ratification have argued that the Convention could "pave the way" for the creation of the international criminal court whose creation is contemplated in Article VI. This would effectively make the Convention self-executing in many respects. Although the committee and the State Department correctly observe that a separate international agreement would be necessary before such a court could be created,[51] it has been suggested that a future President might accede to the jurisdiction of such a court by executive agreement, whereas it is far less likely that he could accede to the Genocide Convention itself by means of such a unilateral device. This is, of course, a political matter rather than a legal one insofar as ratification of

---

[46] Id. at 10.
[47] Hearing, supra note 18, at 45 (statement of Davis Robinson).
[48] Id.
[49] Id. at 23-24.
[50] Id.
[51] Report, supra note 10, at 13.

the Genocide Convention is concerned, but it seems worth worrying about. (In my judgment there would be constitutional problems with an executive agreement depriving the courts of the United States of their exclusive jurisdiction over certain kinds of cases, but up to now the Supreme Court has treated executive agreements as virtual substitutes for treaties.) [52]

(D) Treaties as domestic legislation

A principal point of opposition to the treaty in the past has been that it is either unconstitutional or extremely unwise to use treaties as a means of bringing about, even indirectly, domestic legislation. I agree with the State Department that genocide is a matter of legitimate international concern even if it is also a matter of domestic concern. Assuming that *Missouri* v. *Holland*, 252 U.S. 416 (1920), was correctly decided, this would seem to resolve the constitutional issue. I do think, however, that the policy question is a troublesome one. Specifically, the Convention would obligate Congress to pass vague legislation that might be interpreted by the federal courts—much as the treaty itself could be interpreted by the World Court—to invalidate many current practices. The fear that the Civil Rights Bill of 1984 would have had roughly the same effect was responsible for its defeat; perhaps the legislation that would have to be enacted under the Convention should be subjected to similar scrutiny before we place ourselves under an international obligation to enact it.

V. "UNDERSTANDINGS" OR "RESERVATIONS"

The State Department has recommended that the United States submit "understandings" rather than "reservations," on the ground that the former are used to "clarify" a treaty and the latter to vary its legal effects.[53]

Aside, however, from the question whether the substance of the State Department's "understandings" would be sufficient to avert the risks posed by the Genocide Convention even if they were styled "reservations," there is a risk that by calling them understandings we would lose any effects they might have as reservations.

As a matter of pure theory, it should make no difference what we call these statements, so long as we make it clear that they are essential conditions of our assent. Until recently, most international law scholars agreed that the essential principle was that no nation could be bound to any provision without its consent, so that a unilateral interpretation—at least of an ambiguous provision—if called to the attention of another party operated to bind that party unless the party objected to the interpretation prior to the onset of a specific controversy.[54] An "interpretation," then, would have had the same effect as a "reservation," at least if the provision in question was ambiguous. (Indeed, even is a court were to decide that the provision was *not* ambiguous, and that the "understanding" was a manifest attempt to vary the effects of the treaty, it would have been logical to treat the understanding as a reservation and let it have effect as such.)

The conclusion in 1965 of the Vienna Convention on the Law or Treaties, however, may have changed this rule. Although the United States is not a party to the Vienna Convention, most of its provisions are now generally regarded as customary international law and thus binding on all nations. Although Article 2 (1)(d) supports the State Department distinction between reservations and understandings, the Convention goes on to provide different rules for reservations and interpretations. A unilateral reservation effectively becomes part of the treaty with regard to any party that does not expressly object within a year. (Arts. 20, 21.) Other unilateral documents, on the other hand, never operate as part of the treaty. At best, they become part of the "context for the purpose of the interpretation of a treaty," along with the rest of the negotiation and post-negotiation history—and even then only if they are "accepted by the other parties as an instrument related to the treaty." (Art. 31.)

It would therefore seem quite risky to confine ourselves to mere "clarifications" of the convention and to deny any intent to "vary the legal effects" of the convention. If the World Court were to decide that the real effect of our statements was not to "clarify" but to state an incorrect unilateral interpretation, under the Vienna Convention it could disregard them. Indeed, the Senate Foreign Relations Committee recognized this at the time of the proposed ratification of the SALT II Treaty in 1979, concluding that "the United States should not rely on its own unilateral state-

---

[52] See, e.g., *United States* v. *Belmont*, 301 U.S. 324 (1937); *United States* v. *Pink* 315 U.S. 203 (1942).

[53] See, e.g., L. Oppenheim, International Law (H. Lauterpacht 8th ed. 1955).

[54] See, e.g., L. Oppenheim, International Law (H. Lauterpacht 8th ed. 1955).

ments in order to restrain Soviet conduct under the Treaty." The committee submitted two statements styled "reservations"—although within the definition proffered by the State Department they would properly have been understandings, since they merely reiterated certain "Agreed Statements and Common Understandings," [55] as well as Soviet statements made during the negotiations.

Although it would appear that we have much to gain and little to lose by calling our statements "reservations" rather than "understandings," or at least by requiring every other signatory to accept or reject the statements formally (in an effort to trigger whatever protection is afforded by Article 31 of the Vienna Convention), my worries in this regard are far less substantial if the United States adopts a reservation to Article IX. If the United States courts are the ultimate arbiters of the extent of our obligations under the treaty, the intentions of the United States Senate are likely to be far more important than they would be to the World Court. If an Article IX reservation is adopted, the other statements could safely be designated "understandings" provided that it was made clear that United States ratification was conditioned on our stated understanding of the extent of our obligations under the Convention. We should say in effect that we are designating these statements as "understandings" since we believe them to reflect an accurate interpretation of the treaty, but that we are putting other signatories on notice that if we are incorrect about the "true" meaning of the Convention we wish the statements to have the legal effects of reservations.

VI. RECOMMENDED RESERVATIONS AND/OR UNDERSTANDINGS

I have prepared tentative drafts of four understandings designed to address the major problems posed by ratification of the Convention. The first and most important of these is an Article IX reservation, based on the reservation made by India when it ratified the Convention. The second understanding or reservation is designed to deal with possible conflicts between our international and constitutional obligations, and incidently to deal with any constitutional problems posed by the possible obligation to conclude extradition treaties. The third and fourth statements are strengthened versions of the State Department's proposed understandings on intent and mental harm.

(1) That the United States ratifies this Convention subject to the condition that, with reference to Article IX of the Convention, for the submission of any dispute in terms of this Article to the jurisdiction of the International Court of Justice, the consent of all parties to the dispute is required in each case.

(2) That the United States ratifies this Convention subject to the condition that the United States shall not thereby obligate itself to any act or omission prohibited by the United States Constitution, including but not limited to the enactment of legislation prohibited by the Constitution and the subjection or surrender of any person to the risk of any process of punishment that would violate the Constitution if it were imposed by the United States.

(3) The United States ratifies this Convention subject to the condition that the term "intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such" appearing in Article II of the Convention includes only the specific intent either (a) to destroy the group by causing the deaths of a substantial number of members of the group or (b) for the purposes of Article II(d) only, to destroy the group by preventing a substantial number of births within the group; or (c) for the purposes of Article II(e) only, to destroy the group by means of the forcible transfer of a substantial number of children of the group.

(4) That the United States ratifies this Convention subject to the condition that the term "mental harm" appearing in Article II(b) of the Convention includes only the deliberate and permanent physical impairment of the brain through torture, drugs, or similar techniques designed to cause such impairment, and does not include psychological harm resulting from exposure to conditions not calculated to bring about the physical destruction of the group.

Senator HELMS. Thank you very much.
Mr. Friedlander.

---

[55] See. S. Ex. Rept. 96-14, 96th Cong., 1st Sess. (1979), p. 78.

STATEMENT OF ROBERT A. FRIEDLANDER, PROFESSOR OF LAW, PETTIT COLLEGE OF LAW, OHIO NORTHERN UNIVERSITY, ADA, OH

Mr. FRIEDLANDER. Thank you very much, Mr. Chairman. I am Prof. Robert Friedlander of the Pettit College of Law of Ohio Northern University. I am grateful for your invitation to be here this afternoon.

I am submitting a previously published analysis of state violence and state terrorism for the record.

Senator HELMS. Without objection, it will be made a part of the record.

Mr. FRIEDLANDER. The Genocide Convention was born of fear, frustration, and failure: fear that the barbaric slaughter of the Nazi holocaust would somehow be repeated in the uncertain future; frustration that customary international law had been unable and unwilling to negative the Hitler regime; and a failure by the Nuremberg judges to clearly uphold in their final judgment the controversial charge of crimes against humanity.

The latter concept was intended to mean regime-directed mass killings and state-sponsored murder of a particular group, but it was watered down by the tribunal judges. In other words, partly due to Soviet pressure and partly due to the caution of the other prosecuting governments, crimes against humanity were made punishable only as they related to other criminal acts within the jurisdiction of the Nuremberg tribunal.

Nevertheless, in the euphoric aftermath of World War II, U.N. General Assembly Resolution 96(I), "On the Crime of Genocide," declared it to be "a crime under international law which the civilized world condemns." Its definition included homocide and the denial of the existence of entire human groups, but was couched in sweeping language which listed political groups and cultural deprivations, both of which were eliminated from the convention itself. The Soviets have since indicated on a number of occasions that they consider racism to be a part of genocide.

It should be noted here that a General Assembly resolution is at best an authoritative interpretation of the U.N. Charter and is neither legally binding nor a part of customary international law. In fact, despite claims asserted in testimony by some of my colleagues, including the distinguished president of the American Bar Association, genocide is not an international crime which has become part and parcel of customary international law.

U.N. declarations and resolutions are precatory, not mandatory. Treaties and conventions, on the other hand, represent contractual obligations for signatory States.

Moreover, the Genocide Convention has to this date resolved nothing in a world filled with oppressive mass murdering regimes. The key provisions of the Genocide Convention are domestic rather than international in their essential characteristics. The real consequences of its implementation could be far worse than the prevention sought.

The truth of the matter, one should add, is that the practice of genocide has become so widespread since the drafting of the convention that it has become normative conduct in the modern global

order. During all this time, no fatal injury to the international protection of human rights has occurred because of U.S. abstention.

With U.S. approval of the Genocide Convention, however, the United States, according to article VII, may be compelled to arrest and extradite visiting Israeli diplomats or dignitaries for alleged crimes of genocide or related acts, as claimed by hostile governments and their political allies. This could include an Israeli President, Prime Minister, or Foreign Minister temporarily in the United States on a goodwill trip, let alone Israeli diplomatic personnel residing in this country. American diplomats and Government officials will also be potential hostages to charges of complicity as a result of their aid and assistance to the Israeli Government.

Israel has already been accused by the PLO and its supporters on countless occasions of having perpetrated genocide against the Palestinian people, especially on the West Bank. The subcategories of article II of the convention describe the activities which the PLO asserts Israel has already committed and is continuing to commit under its West Bank occupation.

The recent accusation made against Israel before the U.N. Security Council by Lebanon's Ambassador to the United States indicates that hostile Arab governments would not hesitate to utilize the Genocide Convention in an American forum if given the opportunity.

The convention permits all judges and government officials to be prosecuted, even when acting in their authorized capacity. It follows, then, that U.S. Senators and Congressmen, including you, Mr. Chairman, supporting Israel in its wartime measures or occupation administration on the floor of their respective bodies can also be charged with genocide under articles III and IV.

The United States may be required by existing law, if the Genocide Convention is ratified, to extradite Israeli Government officials or diplomatic personnel to unfriendly Arab countries with hanging kangaroo courts. With the language found in article IX of the convention, there is a means created by which the International Court of Justice can determine the future of the Palestinians by declaring Israel to be involved in a genocidal occupation of the West Bank. There is no doubt that under the Genocide Convention the U.N. view of "Zionism as racism" makes Zionism an act of genocide.

As for the International Court of Justice, it has twice indicated by dicta that the Genocide Convention is universal in its character and "binding on states, even without any conventional obligation." Taking this view and applying it to the wording of article IX, the Genocide Convention enhances ICJ power.

Despite the fact that the convention only criminalizes individual acts, the phraseology of article IX and its quasi-compulsory jurisdiction gives the International Court the power, through the complaint of a single state party, to interpret the meaning and to prescribe the implementation of the convention.

Genocide becomes trivialized when the convention becomes politicized. Instead of stabilizing the international system, the Genocide Convention could contribute to a further destabilization and breakdown by accusation and recrimination.

One should not overlook article VI and the authorization of an international genocide court. The holding in *Wilson* v. *Girard*, 354

U.S. 524, a 1957 case, indicates that such a tribunal can certainly be created by treaty and quite probably by executive agreement. Mr. Tarr indicated a similar belief in his testimony this morning.

The model international criminal court formulated by the International Law Commission, which you referred to earlier this morning, Mr. Chairman, with reference to the Genocide Convention, omits many fundamental constitutional guarantees as determined by U.S. courts from the language of the Bill of Rights. The first 10 amendments were uniquely designed to protect inherent individual human rights, but the Genocide Convention would undermine many of these same protections.

In conclusion, Mr. Chairman, high ideals and nobility of purpose are no substitute for the precision and specificity of constitutional protections. States and governments commit genocide. Individuals commit homicide. The proponents of the convention have stressed the role of that document as a potential human rights symbol, but symbols are often the antithesis of reality.

I do not desire a symbol, Mr. Chairman. I want a convention that works. To paraphrase a prominent Polish priest and defender of the Solidarity Movement, this is an ideological battle to be fought with words and truth.

We must choose wisely and well if we wish to prevent the past from becoming prologue. Genocide is state terrorism and should be dealt with on that basis. This is a bad convention, which has remedied nothing in a world filled with oppressive mass murdering regimes. I urge rejection unless the suggested Helms conditions are adopted.

Thank you, Mr. Chairman, for allowing me to express my views on this matter of vital concern to all of us.

[The following material was referred to on page 71:]

[From the Catholic Lawyer, vol. 25, No. 2, Spring 1980]

On the Prevention of Violence†

(By Robert A. Friedlander*)

[T]hey that take the sword shall perish with the sword.—. . . Matthew 26:52

Not without reason has the twentieth century been called an "Age of Conflict"[1] and "The Century of Total War."[2] In a controversial and widely debated essay written at the end of the Second World War, dissident Marxist philosopher Maurice Merleau-Ponty claims that "violence is our lot. . . . Violence is the common origin of all regimes. Life, discussion, and political choice occur only against a background of violence."[3] Violence is the antithesis of the rule of law. The most recent manifestation of gobal conflict—domestic and international terrorism—is a war against law and law-ordered society.[4] Throughout modern history, advocates of revolutionary change have argued that the end justifies the means and that violent means are

† Report presented to the Pax Romana Conference, Manila, the Phillipines, December 1979.

*Professor of Law, Ohio Northern University; Ph.D. (History), Northwestern University, 1963; J.D., DePaul University, 1973.

[1] F. Chambers, The Age of Conflict: The Western World, 1914 to the Present (3d ed. 1962)

[2] R. Aron, The Century of Total War (1954).

[3] M. Merleau-Ponty, Humanism and Terror: An Essay on the Communist Problem 109 (J. O'Neill trans. 1971).

[4] For those committed to the ways of terror-violence, one observer has commented that "[l]aw is a delusion, and nothing can be hoped for from any action taken within the rules of the social contract." J. Revel, The Totalitarian Temptation 104 (D. Hapgood trans. 1978).

permissible and indeed desirable in order to attain revolutionary ends.[5] This is not only a legitimization of terror,[6] it is also a denial of fundamental human rights.[7]

Few would gainsay the most significant global phenomenon of the third quarter of this century, aside from the development of atomic energy, to be the disintegration and destruction of former colonial empires and the emergence of 100 independent states.[8] Yet, as philosopher Sidney Hook pointed out almost 50 years ago, violence inevitably becomes the handmaiden of mass movements of social and political reform.[9] National liberation struggles have often adopted techniques of terror-violence as the most expeditious method for achieving self-determination, and even the United Nations has condoned rather than condemned such measures.[10] Consequently, the authoritative voice of Pope Paul VI, denouncing all forms of terrorism through his annual Christmas message of December 1977,[11] has gone unheeded by those seeking to revolutionize the social and political order.

Twentieth-century violence between and among nation-states not only engendered the modern alliance system but also played a substantial role in the coming of two world wars.[12] Totalitarian violence directed at captive populations and subject peoples was instrumental in the new post-Second World War international legal formulation making the individual a proper subject for public international law.[13] The legacy of the Nuremberg and Tokyo Judgments—and of the Holocaust era—led to the establishment of the International Protection of Human Rights, beginning with the Universal Declaration of Human Rights in December 1948.[14] Contemporary governmental violence has been a major factor in the further development of theoretical human rights guarantees,[15] but the actual historical record unfortunately demonstrates a contrary trend.[16]

On December 6, 1978, in his White House speech conmmemorating the thirtieth anniversary of the Universal Declaration of Human Rights, American President Carter pointedly observed: "Of all humen rights, the most basic is to be free of arbitrary violence—whether that violence comes from governments, from terrorists, from criminals, or from self-appointed messiahs operating under the cover of politics or religion." [17] The statement is as significant for its bare limitations as it is for its

---

[5] *See, e.g.*, F. FANON. THE WRETCHED OF THE EARTH (C. Farrington trans. 1963); G. SOREL, REFLECTIONS ON VIOLENCE (T.E. Hulme trans. 1941).

[6] A. Camus, Neither Victims Nor Executioners (D. Macdonald trans. 1972) [hereinafter cited as Victims].

[7] South African novelist Alan Paton, a bitter and courageous foe of apartheid, declared: "I regard the rule of law [as] the most fundamental of human rights," The Chicago Tribune, Oct, 26, 1977. § 1. at 2. col. 2.

[8] *See* R. EMERSON, FROM EMPIRE TO NATION: THE RISE TO SELF-ASSERTION OF ASIAN AND AFRICAN PEOPLES (1969); H. JOHNSON, SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS (1967); SELF-DETERMINATION: NATIONAL, REGIONAL AND GLOBAL DIMENSIONS (Y. Alexander & R. Friedlander eds. 1980).

[9] Hook, *Violence*, in 15 ENCYCLOPEDIA OF THE SOC. SCIS. 264, 265 (1935).

[10] Green, *The Legitimization of Terrorism* in TERRORISM: THEORY AND PRACTICE 180–195 (Y. Alexander, P. Wilkinson & D. Carlton eds. 1979).

[11] The Chicago Tribune, Dec 21, 1977, § 3, at 2, col 1.

[12] *See, e.g.*, M. BEAUMONT, THE ORIGINS OF THE SECOND WORLD WAR (S. de Couvreur Ferguson trans. 1978); S. FAY, THE ORIGINS OF THE WORLD WAR (1928); 6 P. RENOUVIN, HISTOIRE DES RELATIONS INTERNATIONALES: DE 1871 A 1914—L'APOGEE DE L'EUROPE (1955); R. SONTAG, A BROKEN WORLD, 1919–1939 (1971).

[13] *See* L. HENKIN, THE RIGHTS OF MAN TODAY 89–115 (1978); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 1–72 (1950). *See generally* PROBLEMES DE PROTECTION INTERNATIONALE DES DROITS DE L'HOMME (K. Vasak ed. 1969).

[14] LAUTERPACHT, *supra* note 13, at 428–34; *see id.* at 399–428. *See also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 463, 445–86 (1966); Moscowitz, *Wither the United Nations Human Rights Program, reprinted in* [1976] 6 ISRAEL Y.B. ON HUMAN RIGHTS 81.

[15] U.N. Secretariat, United Nations Action in the Field of Human Rights, UN. Doc. ST/HR/2, *reprinted in* J. JOYCE, HUMAN RIGHTS: INTERNATIONAL DOCUMENTS 118–341 (1978); M. CRANSTON, WHAT ARE HUMAN RIGHTS? 43–61 (1962); M. MOSCOWITZ, THE POLITICS AND DYNAMICS OF HUMAN RIGHTS (1968); INTERNATIONAL PROTECTION OF HUMAN RIGHTS 505–913 (L. Sohn & T. Buergenthal eds. 1973).

[16] *See, e.g.* U.S. DEPT. OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 95TH CONG., 2D SESS. (Jt. Comm. Print 1978); FOREIGN AFFAIRS AND NAT'L DEFENSE DIV., CONG'L RESEARCH SERV., LIBRARY OF CONG., HUMAN RIGHTS CONDITIONS IN SELECTED COUNTRIES AND THE U.S. RESPONSE, 95th Cong., 2d Sess. (Comm. Print 1978).

[17] 79 U.S. DEP'T OF STATE, BULL. No. 2022 (Jan. 1979), at 1; New York Times, Dec. 7, 1978, § A, at 10, col. 1.

fundamental assumptions. Non-arbitrary, purposeful, selective violence, if it be in the national interest or for a deserving cause (the latter most likely related to a majoritarian concept), is impliedly permissible.

Who decides the justice of a particular cause? Can there ever be a truly just war? [18] And what of the right of self-defense? No civilized human being can deny "that Nazism was an ultimate threat to everything decent in our lives, an ideology and a practice of domination so murderous, so degrading even to those who might survive, that the consequences of its final victory were literally beyond calculation, immeasurably awful."[19] Yet, random and non-strategic terror-bombing during World War II took the lives of thousands of German civilians, many of whom ere sacrificed for apparently psychological purposes or were punished under a retributative theory of collective guilt.[20]

Within three decades after the Nuremberg Judgment, the legal justification for that tribunal had come under serious and extensive attack. [21] The Nuremberg trials, if nothing else, were a determined attempt to reestablish the framework for a global rule of law, and this certainly was the import of the International Law Commission's Nuremberg Principles [22] and the subsequent Draft Code of Offenses against the Peace and Security of Mankind, [23] neither of which were ever voted upon by the United Nations General Assembly.[24] But *whose* rules and *what* law?

On December 14, 1974, the General Assembly adopted by consensus a Definition of Agression.[25] It is a narrow determination at best, concerned only with violations of the classic rights of territorial integrity and political independence as opposed to military force, and even this limited delict must first involve a violation of the Charter.[26] Not only are economic and psychological agressions totally unrecognized, but third party intervention is deemed to be permissible, and by implication desirable, in matters of self-determination and wars of national liberation. Thus, not only has the world community failed to advance from its original confirmation of the Nuremberg Judgment,[27] but it has in effect sanctioned revolutionary violence promoted by non-aggrieved parties. Small wonder, then, that General de Lattre de Tassigny wryly observed after his arrival in Vietnam that "[h]istory has never been anything but illusions."[28]

Another consequence of the Nuremberg and Tokyo Tribunals and of the war crimes issues deriving from the Second World War war the recodification of the laws of war by the Geneva Conventions of 1949. Since the international outlawry of war as an instrument of national policy by the Kellogg-Briand Pact of Paris in August 1928 lasted barely a decade,[29] and since the atrocities of World War II rekindled a modern barbarism, the expansion and restructing of the laws of war were an inevitable recognition that state violence could not be eradicated in the post-Charter era.[30] The two Protocols Additional to the 1949 Geneva Conventions, signed

---

[18] *See* Y. MELZER, CONCEPTS OF JUST WAR (1975); M. WALZER, JUST AND UNJUST WARS (1977). Eugene Davidson comments that "from the Communist point of view . . . a socialist war is always a just war." E. DAVIDSON, THE NUREMBERG FALLACY 19 (1973).

[19] WALZER, *supra* note 18, at 253.

[20] *Id.* at 251–63.

[21] *See, e.g.*, G. BAILEY, GERMANS: BIOGRAPHY OF AN OBSESSION 99–122 (1974); E. DAVIDSON, THE TRIAL OF THE GERMANS 580–94 (1966); O. KIRCHHEIMER, POLITICAL JUSTICE 323–41 (1961); H. PACHTER, MODERN GERMANY: A SOCIAL, CULTURAL AND POLITICAL HISTORY 255–57(1978); B. SMITH, REACHING JUDGMENT AT NUREMBERG 302–06 (1977).

[22] 5 U.N. GAOR, Supp. (No. 12), U.N. DOC. A/1316 (1950).

[23] 9 U.N. GAOR, Supp. (No. 9), U.N. DOC. A/2693 (1954).

[24] Bilder suggests, not altogether persuasively, that widely cited documents such as these (and the Genocide Convention) "have through very broad acceptance assumed the status of customary law binding even on nations which have not expressly agreed to them." Bilder, *The Status of International Human Rights Law: An Overview*, in INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE (J. Tuttle ed. 1978).

[25] G.A. Res. 3314. 29 U.N. GAOR, Supp. (No. 31), U.N. Doc. A/9890 (1974).

[26] One author offers a savage critque of the U.N. effort. J. Stone, CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION (1977). *Contra.* 2 B. FERENCZ, DEFINING INTERNATIONAL AGGRESSION: THE SEARCH FOR WORLD PEACE 50–53 (1975).

[27] G.A. Res. 95, 1 U.N. GAOR 55 (1946).

[28] L. BODARD, L'AVENTURE: DE LATTRE ET LES VIETS 115 (1967).

[29] Renouvin notes that the Paris Peace Pact implied the legal use of force against transgressors of the League Covenant and the Locarno security treaties. 5 P. RENOUVIN, HISTOIRE DES RELATIONS INTERNATIONALE: LES CRISES DU XX SIECLE—DE 1914 A 1929, at 342 (1957).

[30] For an excellent discussion of Bindfschedler-Robert, see *Problems of the Law of Armed Conflicts* §§ 1–3, in 1 A. TREATISE ON INTERNATIONAL CRIMINAL LAW 295–319 (M. Bassiouni & V. Nanda eds. 1973).

in 1977, have by international agre ent raised national liberation conflicts and civil wars to the juridical level of inter-state wars. And the legal distinction between terrorist and guerrilla has thus been blurred to the point of meaninglessness.[31] It should not be surprising, therefore, that a renowed international legal scholar has assumed the contemporary world is on the verge of relapsing "into violence unlimited and [into] neo-barbarism.[32]

There likewise seems to be no general agreement among legalists as to the authorized use of force under the United Nations Charter beyond the right to self-defense provided by Article 51.[33] No one has yet been able to define precisely the meaning of the term "self-defense," [34] though all too often might has determined right when a state has chosen to exercise that privilege. A distinguished French political commentator has argued that "[p]eace is above all a legal postulate" and hence is "morally indifferent." [35] This strikes at the heart of the very notion of the rule of law. Power politics is a condition of international relations rather than the consequence of positivistic law. Whether it be Emheric de Vattel writing during the climax of the eighteenth-century Enlightenment [36] or John Rawls during the seventh decade of the twentieth century,[37] they and the majority of international jurisprudentialists are agreed that basic human rights, as well as notions of societal good, run counter of the exercise of force and the promulgation of violence. Former United Nations Secretary General Dag Hammerskjöld, however imperfect his vision, devoted himself to the pursuit of an international common law, and viewed the United Nations Charter as the linchpin of a global society: "The Principles of the Charter are, by far, greater than the Organization in which they are embodied, and the aims which they are to safeguard are holier than the politics of any single nation or people."[38]

Violence has adopted many forms during modern times, only some of which are subject to international regulation. Major typologies include: (1) state against state; (2) state against people; (3) people against state; and (4) people against people. The first three categories contain external elements and are proper subjects of public international law or of international criminalization through treaty and convention. The fourth form is primarily domestic, though even here certain activities such as genocide (by one group directed against another) can create an international jurisdiction.

In the first encyclical of his pontificate, *Redemptor Hominis*, dated March 4, 1979,[39] Pope John Paul II strongly condemned all violations of "the objective and inviolable rights of man," among which were numbered "concentration camps, violence, torture, terrorism, and discrimination in many forms." His emphasis seemed to be placed on state abuses and unbridled state power,[40] although he likewise underscored dangers inherent in the disintegration of legitimate authority and the spread of societal dissolution. Whereas the former condition provided the dominant characteristic of the middle of this century, the latter situation has been endemic during the last two decades. It has become almost a truism to say that "[s]ocieties

---

[31] *See*, particularly, the critique of Dinstein, *The New Geneva Protocols: A Step Forward or Backward?* in [1979] 33 Y.B. OF WORLD AFFAIRS 265. *See generally* Bassiouni, *Repression of Breaches of the Geneva Conventions under the Draft Additional Protocol to the Geneva Conventions of August 12, 1979*. 8 RUT.-CAM. L.J. 185, 1984-218 (1977); Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 A. J. INT'L L. 272 (1978).

[32] G. SCHWARZENBERGER, THE DYNAMICS OF INTERNATIONAL LAW 90 (1976).

[33] *See generally* D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW (1958); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); ESSAYS ON INTERNATIONAL LAW AND RELATIONS IN HONOUR OF A.J.P. TAMMES (H. Meijers & E. Vierdag eds. 1977); HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (R. Lillich ed. 1973); LAW AND CIVIL WAR IN THE MODERN WORLD (J. Moore ed. 1974). AN OVERVIEW OF THE RECENT LITERATURE, PARTICULARLY ON THE ISSUE OF HUMANITARIAN INTERVENTION, CAN BE FOUND IN FRIEDLANDER, *The* Mayaguez *in Retrospect: Humanitarian Intervention or Showing the Flag?* 22 ST. LOUIS L.J. 601 (1978).

[34] *See* D.W. GRIEG, INTERNATIONAL LAW 892-897 (2d ed. 1976); E. JIMINEZ DE ARCHAGA, DERECHO CONSTITUTIONAL DE LAS NACIONES UNIDAS 397-412 (1958); H. KELSEN, THE LAW OF THE UNITED NATIONS 269 (1964); F. REUTER, DROIT INTERNATIONAL PUBLIC 376-78 (1968).

[35] R. ARON, PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS 717 (R. Howard & A. Baker Fox trans. 1967).

[36] E. DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS 301-03 (J. Chitty trans. 1835) (1st ed. France 1758).

[37] J. RAWLS, A THEORY OF JUSTICE 377-82 (1971).

[38] HAMMARSKJÖLD: THE POLITICAL MAN 5-6 (E. Kelen ed. 1968).

[39] Pope John Paul II, *Redemptor Hominis* (March 4, 1979), *reprinted in* The Tidings (Los Angeles), Mar. 23, 1979, at 8, col. 2.

[40] *Id.* at 9, col. 1.

disintegrate from within more frequently than they are broken up by external pressures." [41] Statist repression is one explanation. Frustration of rising expectations is another. Insurrection, rebellion, and revolution are by their very nature violent in some form, seeking an overthrow or a destruction of the established order, a fact trenchantly expressed by Albert Camus' metaphorical observation that "revolutionary times begin—on a scaffold." [42]

Certainly, rebellion and revolution are recognized by international law as legitimate remedies applied against oppressive, exploitative, and even ineffective regimes. There are those who argue that revolutionary violence has not only been "an unavoidable historical necessity" but has resulted in a greater good for the greater number (i.e., the Revolt of the Netherlands, the Puritan Revolution, the American Revolution, and the French Revolution).[43] Even if true, this does not justify present or future violence. Twentieth-century revolutions have increasingly combined ideology and terror with dire results for all factions.[44] Violence comes to have a logic for its own sake, or as Jean-Paul Sartre maintains, "[v]iolence, like Achilles' lance, can heal the wounds that it has inflicted." [45] It may very well be that violence has become the common denominator of this century's historical development.[46]

With his usual prophetic insight, Leon Trotsky declared at Brest-Litovsk: "Every state is based on violence." [47] In the third quarter of this century, revolution, particularly when directed at actual or alleged colonial oppressors, has come to mean guerrilla warfare, which in turn translates into revolutionary terror-violence.[48] Mao Tse-tung's legendary aphorism that "[p]olitical power grows out of the barrel of a gun," [49] reflects both his own historic experience [50] and twentieth-century realities. Revolutionary terror-violence committed in the name of popular liberation, whether by urban or rural guerrillas, has invariably consisted of the same techniques—street warfare, assassination, seizing (and killing) of hostages, burning, bombing, pillaging, and torturing (mental or physical).[51] Hannah Arendt writes that no matter how necessary, violence can never be legitimate.[52] Certainly, neither the Left nor the Right have a monopoly on illegitimate violence, as the recent history of Algeria, Latin America, and Southeast Asia clearly demonstrates.

Arguments have been made by Third World legal and political theorists that public international law prior to and following the United Nations Charter has been Western oriented and Western implemented and seeks to maintain the dominance of the colonial and capitalist systems.[53] Soviet scholars have been more cautious during the last generation, but they are severely critical of the old pre-Charter legal norms and emphasize instead the substantive changes brought about by national liberation movements and the emergence of new state sovereignties.[54] Even Soviet scholars of great prominence, such as G.I. Tunkin, have denounced the "predominant bourgeois doctrine of international law" and its reluctance to accept fundamental changes.[55] Third and Fourth World legal and political commentators have been especially harsh in their criticism of the Western concept of minimum world public order, seeing it as a thinly disguised attempt to sustain the status quo,[56] yet Western critics of the new United Nations majority are just as sharp in their aversion for allowing "agents of subversion, terrorist commandos [to] pass across or through frontiers without being formally condemned by the international organizations or even by the interpreters of international law." [57]

---

[41] P. DEVLIN, THE ENFORCEMENT OF MORALS 13 (1965).
[42] A. CAMUS, THE REBEL: AN ESSAY ON MAN IN REVOLT 111 (A. Bower trans. rev. ed. 1956).
[43] This argument is noted but not supported by B. MOORE, JR., REFLECTIONS ON THE CAUSES OF HUMAN MISERY—AND UPON CERTAIN PROPOSALS TO ELIMINATE THEM 28 (1972).
[44] H. ARENDT, ON REVOLUTION 51 (1963).
[45] Sartre, *Preface to* FANON, *supra* note 5, at 30.
[46] H. ARENDT, ON VIOLENCE 3 (1970).
[47] *Id.* at 35. "We fight, therefore we are." M. BEGIN, THE REVOLT, ch. 2 (1978).
[48] *See generally* C. DELMAS, LA GUERRE REVOLUTIONAIRE (1965). Other sources are too numerous to mention, for the literature on this subject has been inexorable.
[49] QUOTATIONS FROM CHAIRMAN MAO TSE-TUNG 33 (S. Schram ed. 1967).
[50] S. SCHRAM, MAO TSE-TUNG 132–228 (1966).
[51] A DECOUFLÉ, SOCIOLOGIE DES REVOLUTIONS 93 (1970).
[52] H. ARENDT, ON VIOLENCE 52 (1970).
[53] *See, e.g.*, Bedjaoui, *Non-alignment et Droit International*, 151 *in* RECUEIL DES COURS (HAGUE Academy) 339, 382–86 (1976).
[54] *See generally* R. ERICKSON, INTERNATIONAL LAW AND THE REVOLUTIONARY STATE (1972).
[55] G. TUNKIN, THEORY OF INTERNATIONAL LAW 257 (W. Butler trans. 1974).
[56] Bedjaoui, *supra* note 53, at 382–84, 407–14.
[57] ARON, *supra* note 35, at 124.

Nowhere have the tumultuous forces of human rights, imperialism, nationalism, war, revolutionary violence, authoritarianism, and Marxist ideology come into greater collision than in Southeast Asia during the last four decades. The Vietnam war, particularly in its American phase, entailed on the part of American legal scholars an agonizing reappraisal of the substantive nature of the contemporary international law, its processes, and its prospects. The resulting cacophony resolved very little, but did reveal in stark coloration the strengths and weaknesses of the international legal system.[58] It also sadly demonstrated that although law is designed as a means of conflict resolution, both remedies and solutions are as much prisoners of events as they are orderly ways of dealing with disorder.[59]

Twentieth-century ideological revolutionary wars and national liberation struggles historically have been more savage than their nineteenth century counterparts.[60] Indochina's 2,000 year history of violence—war, conquest, and rebellion—does not differ in kind from that of her former European masters. Perhaps the enmities between peoples have been longer lasting and the ethnic hostilities more intense in Southeast Asia, but the record of Eastern cruelty and inhumanity is no worse than that of the Christian West. The failure of peace within the last half century, however, is partially the failure of international law.

The political agreement between the parties assembled in Geneva during July, 1954 was ignored almost from the very start. Because it was obviously a political rather than a legal document,[61] the principle of *pacta sunt servanda* turned out to be ignored by both sides as it suited their purposes. A recent American study has argued that there was no collective obligation to abide by the terms of the 1954 Declaration because all parties had not agreed to agree.[62] A better view is that no one was legally bound since the Final Declaration was neither treaty nor convention but merely a statement of intent. The Act of Paris, signed on March 2, 1973,[63] is another matter. To say that it was negotiated in bad faith by at least three of the parties, and therefore void *ad initio*, does not negate the obvious ineffectiveness of international agreement in putting an end to military conflict and revolutionary violence as compared to force of arms. The Joint Communiqués [64] were in retrospect broadly worded political camouflage making the best of a bad business—that South Vietnam had truly nothing to negotiate and that its American ally was straining to depart in unseemly haste. International law had by this time nothing to offer, and therein lies a lesson.

In Africa, Asia, and the Middle East, national liberation struggles have cloaked themselves in the protective colors of the "Just War." Violence of whatever kind, no matter who are its victims, is justified because of the alleged justness of the cause and the asserted rightness of its goal. Witness the claim of General Vo Nguyen Giap, architect of the Viet Minh triumph: "this is a just war, a national liberation war, or a war to protect the fatherland . . . ." [65] Violence thus becomes sanctified in the name of a greater good, and opposition to those raising the liberation banner becomes intolerable and unforgiveable. To react against revolutionary violence is to wage an unjust battle. "Fought by foreigners, it is a war of aggression; if by a local regime alone, it is an act of tyranny." [66] But is the mere claim of liberation enough? What role is left to legality? Who determines who is to suffer and who is to survive? Do victims have any rights? What of the nameless masses who, in the words of Albert Camus, "want to be neither victims nor executioners"? [67]

Another conflict has now enveloped the Indochinese peninsula. It is both external and internal, combining interstate violence on the one hand with intrastate oppression on the other. Vietnam has overthrown Pol Pot's democratic Kampuchea

---

[58] *See* THE VIETNAM WAR AND INTERNATIONAL LAW (R. Falk ed. 1968–1976) (4 vols.) [hereinafter cited as VIETNAM WAR].

[59] See the comments of Fisher, *Enhancing Order (and Law) in Future International Crises*. 70 PROC. AM. SOC. INT'L L. 123, 135 (1976).

[60] Perhaps the one exception is the Paris Commune of 1871. *See* A Horne, the Terrible Year: The Paris Commune, 1871; P LISSAGARAY, HISTOIRE DE LA COMMUNE DE 1871 (1970).

[61] Final Declaration of the Geneva Conference on the Problems of Restoring Peace in Indo-China, Geneva, July 21, 1954, *reprinted in* 1 VIETNAM WAR, *supra* note 58, at 557–59.

[62] LEWY, AMERICA IN VIETNAM 9 (1978).

[63] Act of the International Conference on Vietnam, Signed at Paris March 2, 1973, *Reprinted in* 4 VIETNAM WAR, *supra* note 58, at 864–66.

[64] Four-Party Joint Communique, Signed at Paris on Implementation of Vietnam Agreement, June 13, 1973, *reprinted in* 4 VIETNAN WAR, *supra* note 58, at 867–70.

[65] V. NGUYEN-GIAP, BANNER OF PEOPLE'S WAR, THE PARTY'S MILITARY LINE 16 (G. Boudarel trans. 1970).

[66] WALZER, *supra* note 18, at 196.

[67] VICTIMS, *supra* note 6, at 27.

regime, and a government based upon internal violence has finally succumbed to external aggression. China's incursion into Vietnam ostensibly to teach the Vietnamese "a lesson" ended as it began, in uncertainty, but threatens to be resumed at any time. And in Vietnam itself, a fourth conflict (following the French, American, and Vietnamese civil wars) is now occurring, with the Vietnamese government making war upon its Chinese citizenry and perpetrating "blackmail, extortion, and expulsion" upon its people.[68] While the world watched first in horror and then in anger, "Asian indifference and rejection of the Vietnamese Boat People finally resulted in the calling of an international conference of sixty-five countries at Geneva in July, 1979, where Vietnam pledged itself to deny official egress to its oppressed Chinese,[69] thereby violating certain fundamental rights proclaimed in the Universal Declaration.[70]

Is international law merely a passive instrumentality to be fashioned by states and regimes into any shape they desire, or is it a meaningful device to protect and enhance human dignity? One widely quoted American scholar has derided international law as being "not supported by effective institutions. As such, it is a program and little else." [71] George Kennan, experienced diplomat and noted historian considers international law and the "legalistic approach to international relations" to be inherently suspect and warns of over-dependence upon an international juridical system.[72] Political scientist Hans Morgenthau indicates that when law confronts politics, the former inevitably gives way to the latter.[73] Even famed legalist Georg Schwarzenberger, for all his significant contributions to legal theory and practice, takes a pessimistic view of the contemporary international legal system.[74]

Have we then condemned ourselves to a permanent condition of minimally controlled international violence? International law, like its domestic counterpart, stands for impartial restraints on national behavior.[75] If we are a global village, to adapt the terminology of Dag Hammerskjöld,[76] then the international legal system must be something more than a body of lifeboat ethics. World public order is a desirable goal because there truly is no alternative if humankind is to discard lawlessness, violence, and bloodshed.[77]

The historical record is not encouraging. Despite the vast gains made in the two decades before the outbreak of the First World War on limitations of armament, the laws of war, arbitration and conciliation, during the years of crises leading up to that disastrous conflict, international law was largely ignored. The interwar period was composed of ineffective and ultimately futile attempts to limit not only armaments but war itself as an instrument of national policy. The League failed, not because of its Covenant, but because no state paid any attention to it. In the United Nations era, global conflict has become the norm, and the United Nations Charter, which at its origin was primarily a collective security document,[78] has been used only once for that purpose (Korea) and probably never again will be so employed. Only in regard to non-state actors and the threat of terror-violence has the United Nations made any progress, and that has been a cautious and sometimes tortuous evolution.[79]

Just as there is truly no substitute for peace, so must there be an end to international violence if humankind is to progress—or even to exist. In the human rights arena alone, there are sufficient treaties, conventions, and declarations (plus the basic principles of the United Nations Charter) to end world violence, if the world community really wished to end that scourge of humanity. Modern science and technology have put Armageddon just around the corner. An equitable and enforceable

---

[68] *See* Lacouture, *The New Horror*, N.Y. Rev. of Books, Aug. 16, 1979, at 39–40.

[69] For the nature of that oppression, see Held, *How it Works*, N.Y. Rev. of Books, Aug. 16, 1979, at 40.

[70] *See* Universal Declaration of Human Rights, arts. 12, 13, G.A. Res. 217, 3 U.N. GAOR 71, 73–74, U.N. Doc. A/810 (1948).

[71] J. SHKLAR, LEGALISM 129 (1964).

[72] G. KENNAN, AMERICAN DIPLOMACY, 1900–1950, at 95–101 (1952).

[73] H. MORGENTHAL, POLITICS AMONG NATIONS 242–63 (1948).

[74] *See* Friedlander, *Power Politics and the Rule of Law: Professor Schwarzenberger Reconsidered*, 24 De Paul L. Rev. 836 (1975).

[75] R. FISHER, POINTS OF CHOICE 84–85 (1978).

[76] HAMMARSKJÖLD, *supra* note 38, at 9–10.

[77] In Ireland, Pope John Paul II made the ringing declaration: "Violence destroys what it claims to defend, the dignity, the life, the freedom of human beings. Violence is a crime against humanity, for it destroys the very fabric of society." New York Times, Sept. 30, 1979, § 1, at 28, cols. 2–3. *See* U.N. CHARTER art. 1, § 1.

[78] U.N. CHARTER art. 1, § 1.

[79] *See* 16 U.N. CHRONICLE 74 (July 1979); 16 U.N. CHRONICLE 37 (Mar. 1979).

international legal system is still possible, if there is a sense of justice and a will to enforce. As Jacques Maritain has wisely written: "When men will have a will to live together in a world-wide society, it will be because they have a will to achieve a world-wide common task."[80] Mere survival is not enough.

Senator HELMS. Thank you very much.

The Chair would make an observation. We have a little time problem with Mr. Elie Wiesel. He has to catch a plane, and I would like to ask him, if he will, to come up and join the gentlemen at the table. We do not want you to miss your plane, even though we would like to keep you around here. If you would come up, sir.

The Chair would also like to thank Mr. Moore. The committee will be delighted to hear your statement, and I apologize for not calling on you.

STATEMENT OF JOHN NORTON MOORE, WALTER BROWN PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VA

Mr. MOORE. Not at all, Mr. Chairman.

It is a very special privilege and pleasure to accompany President John Shepherd to appear before this committee to testify on behalf of the American Bar Association in strong support of Senate advice and consent to the Genocide Convention. This committee, Mr. Chairman, has reported out the Genocide Convention favorably on five separate occasions, and seven Presidents of the United States have strongly urged Senate advice and consent to the genocide convention.

In the judgment of the American Bar Association, it is strongly in the foreign policy and national security interest of the United States to promptly ratify this convention. Mr. Chairman, I think there are four principal reasons for that.

The first of those is that ratification would restore U.S. leadership in the continuing effort to strengthen international norms against genocide. United States accession is a statement of conscience for a free democratic people.

Sometimes we take for granted something that we all know is around us, and that is a struggle for power in the world, but we do not as clearly understand that there is a struggle for law and principle that is vitally important and that is taking place every day. The democratic governments of the world must provide the continuing leadership in that struggle, primarily against totalitarian regimes, and in my judgment the Genocide Convention is one of the significant symbolic gestures that we can make in that important continuing battle.

Now, some have said that symbolic gestures are not particularly important. Well, I think that Mr. Jefferson, who founded my University at Virginia, would have been rather startled by that, since he chose to place his authorship of the Virginia Declaration of Religious Liberties as one of his greatest achievements in his lifetime. I think, Mr. Chairman, the draftsman of the Declaration of Independence of the United States would be startled by the proposition that symbolic documents are somehow not particularly important.

---

[80] J. MARITAIN, MAN AND THE STATE 207 (1951).

And I think that the negotiators of the United States in the continuing Helsinki talks that rely on Basket III, the human rights provisions that are not even legally enforceable, are not even under the convention called laws, I think that those negotiators would be shocked at the notion that somehow the provisions on human rights in Basket III that have been so important in terms of public accountability of Soviet violations of human rights somehow are not of particular importance.

Second, the ratification is important because it will remove a propaganda theme used by totalitarian regimes against the United States. It has been one of my privileges to serve on the U.S. delegation to the CSCE talks, the continuing Helsinki talks that place accountability of the Soviet behavior very high on its agenda of objectives.

In those talks, it has become very clear to everyone, as Ambassador Max Kampelman and Ambassador Jeanne Kirkpatrick has indicated for general U.N. behavior, that the Soviet Union and their client states regularly and deliberately seek to use against the United States its nonratification of the Genocide Convention. That is a fact. It is something that is used to divert attention from their own human rights abuses and to attack the United States in ways that are completely unjustified.

A third reason why ratification is useful is that ratification will enable the United States to more clearly focus international attention on contemporary totalitarian genocides such as, in my judgment, that of the Khmer Rouge attack on the Chelm in Cambodia or, I believe, the Sandinista attack on the Mosquito Indians in Nicaragua.

The United States, as long as it has not ratified the Genocide Convention, deals with the subject of genocide with one hand tied behind its back. I do not believe that is an appropriate way for Uncle Sam to fight on such an important issue. The United States, if it ratifies the Genocide Convention, one, will have that removed in the sense that we now are a member of the Genocide Convention and need not be troubled somehow that someone will respond: Well, why are you raising a genocide issue; you have not even ratified the Genocide Convention?

And in addition to that, the United States would be able, if we do not have a reservation to article IX, to proceed directly in the court against nations that have failed to honor their obligations under the Genocide Convention. That it seems to me is a significant added power of the United States in seeking to punish genocide and prevent its occurrence.

Finally, Mr. Chairman, ratification will easily enable the United States to rebut false charges and disinformation with respect to actions of the democracies and their allies. In this connection, I think we should realize, counter to what my colleague has just indicated earlier on the panel, that in fact the crime of genocide is generally recognized by the United States as a customary international law crime. I would cite the restatement of the Foreign Relations Law of the United States which is generally regarded as an authoritative statement on customary international law binding on the United States, and is cited by the U.S. courts more than any other single document on that particular issue.

That means, Mr. Chairman, that since we are at present subject to a suit before the International Court of Justice under the optional clause, not on the basis of a convention with carefully worked out understandings, not on the basis of a convention that has a fairly narrowly drawn definition of genocide, but simply on a general notion of customary international law of genocide which is undefined, that the United States is at present subject to substantial risk in the International Court of Justice and greater risk than would the United States be subject if we were to accept the treaty and not reserve under article IX.

Let me just go through that again. Genocide is a crime under customary international law. The United States has accepted the general jursidiction of the court under the optional clause. That means that we are now subject to suit before the ICJ without the benefit of the treaty careful definition or the U.S. understandings that would go along with that.

Now, one of my colleagues on the panel has said yes, but in that particular case we would have the benefit of the Connally reservation, and we would have the benefit, one could argue in addition, of the Vandenberg multilateral party reservation. The difficulty with that, Mr. Chairman, is that the Connally reservation is of extremely uncertain legal effect. I am one of those that participated on behalf of the United States in the recent argument and presentation of the case before the Court in the *Nicaragua* case, and if we had believed that the Connally reservation would have been a useful way to resolve the case, I can assure you it would have been strongly invoked by the United States. The simple reality is that even though the language of Connally says "as determined by the United States," the sad truth is that issue and its continuing validity is still subject to judgment by the International Court of Justice.

So at the present time we are not protected by something that is very protective under international law. It is just the opposite in the Connally reservation, and instead, we are subject to general suit under the optional clause in a setting of very vague definition and no U.S. understandings to try to clarify that.

So in that case it seems to me one of the strong reasons for ratifying this Convention is in fact to reduce the risk of disinformation cases. It certainly does not eliminate it, Mr. Chairman. I would not here as a realist seek to argue that. I think there is some risk. But it does seem to me that it reduces it significantly and is an affirmative reason to go along with the Genocide Convention.

Now, in closing let me just mention some points with respect to whether there ought to or ought not to be a reservation on article IX, since that seems to be a rather significant issue that the committee has been focusing on.

The American Bar Association believes that we should not have a reservation to article IX. There are at least five reasons for that. First, nonacceptance, that is, a reservation, would cast doubt on whether the United States has accepted the Genocide Treaty and is a party to the convention. This morning the legal adviser of the Department of State indicated that there were three states, Australia, the Netherlands, and the United Kingdom, that say that such a reservation is incompatible with the objects and purposes of the treaty, and therefore we already have a setting in which two

NATO allies have made a statement that would regard a United States reservation as incompatible with the objects and purposes of the treaty, and therefore, under international law, the treaty, they would say, would not be in force for them.

It is not simply a matter of counting those three in the 96 and saying there is no problem for the rest because the international test is simply one of whether this is consistent with the object and purpose of the treaty. Since three nations have gone on record as saying it is inconsistent with the object and purpose of the treaty, it is entirely possible that many other nations, if the issue were to arise, would take the same position, and it is certainly embarrassing that of those nations that have made that statement, two of them are NATO partners of the United States.

Second, Mr. Chairman, the point I earlier made that acceptance narrows United States present liability to a charge of genocide under the treaty rather than broadening that general liability of the United States, so that if we had a reservation in this particular case, we would be in exactly the setting we are currently in, which is we can be sued in the International Court of Justice. The standard would be a vague, customary international law standard, for example, Resolution 96 of the General Assembly has no definition of genocide whatsoever, and it would be in a setting in which we would not have significant protection from the Connally reservation.

The third point is that we would like to be able to use this convention to enforce against grotesque totalitarian behavior. One of the reasons we include routinely in terrorism conventions a clause referring to the International Court of Justice is for precisely that reason. The Montreal and Hague Conventions and the Tokyo Convention on aircraft hijacking, for example, all contain clauses on reference to the International Court of Justice. The optional clause on the treaties on protection of diplomats or those on protection of diplomats in general have a reference to the court, and the United States was effectively able to use that clause in taking Iran to the International Court of Justice and winning in the International Court of Justice in that case.

It is true, Iran did not change its totally illegal behavior in that case, but it did aid in bringing pressure on Iran in a setting of absolutely outrageous behavior. If we had a reservation, we could not affirmatively use this against others.

My own feeling in this is that it is not the democracies that by any stretch of the imagination need fear genocide. If we have false cases brought against us, let's respond on the merits as to why they are false. The totalitarian governments do fear charges of genocide, and I think without a reservation, this would be a more important instrument in the hands of the democracies.

In addition to that, nonacceptance puts us in the same moral mode as the Soviet bloc. Of the 15 nations that have reservations to article IX, nine of those nations are Communist countries, and that is for a very good reason, because they are particularly concerned about the risk of genocide actions being brought against them.

I might also add, Mr. Chairman, one interesting fact is that there are a number of states that initially were not Communist at the time the Genocide Convention came along that do not have the

usual Soviet bloc genocide reservations that subsequently became Communist that would be subject to direct suit by the United States under the Convention for future genocidal behavior. They include, interestingly, Cuba, Nicaragua, Vietnam, Cambodia, and Afghanistan in terms of the puppet regime of the Soviet Government there at the present time, and to name one non-Communist society that has been engaged in some rather doubtful behavior, Iran also is in that category without having a reservation and being subject to suit.

Finally, Mr. Chairman, I would like just to indicate a couple of other general differences here with respect to acceptance of the court under article IX and the general compulsory jurisdiction of the court. This is a setting unlike the general acceptance of the compulsory jurisdiction of the court, where only two permanent members of the Security Council, also both NATO members, have accepted the permanent jurisdiction, that is the United States and the United Kingdom. In this case, those on the western side of that equation have all accepted without reservation under article IX. This is not a setting as again under the compulsory jurisdiction where only some 40 nations out of the entire community of nations have accepted. Here we have almost 100 nations accepting, roughly two-thirds of the nations of the world having accepted the provision. And finally, unlike the general acceptance of the jurisdiction of the court, any case here would come up under the specific normative standards of a treaty to which we have agreed.

Thank you, Mr. Chairman.

Senator HELMS. Thank you very much.

Would you please pass the microphone down to Mr. Wiesel?

Today we are especially honored—we are honored to have all of you, of course—but we have with us one of the most distinguished men of American letters, Mr. Elie Wiesel. Mr. Wiesel is, I guess, what the Japanese call a national treasure, not only because of his books and novels—27 or something like that—but because of his unique experience and his unique witness to the reality of the Holocaust.

There is probably nobody alive today who has worked more eloquently to help us understand the meaning and impact of genocide, not only upon the Jewish people, but upon all those who participate in our civilization.

I for one, sir, have been looking forward to your testimony, and we welcome you.

Senator BOSCHWITZ. Mr. Chairman?

Senator HELMS. Yes.

Senator BOSCHWITZ. Mr. Chairman, I would like to make a statement at this time. I was unable to be here for the other witnesses because I was at the Budget Committee markup, and that has just consumed my time.

Senator HELMS. Senator, let me just make one inquiry.

Am I informed correctly, Mr. Wiesel, that you must leave at about 3:55?

Mr. WIESEL. If possible, Mr. Chairman. Yesterday I came from Oslo, Norway. Today I came from St. Louis, and if possible, I would like to leave at 3:55, if it is not inconvenient.

Senator BOSCHWITZ. Well, I will not take more than 4 or 5 minutes, Mr. Chairman.

Senator HELMS. OK. Please go ahead.

Senator BOSCHWITZ. I have known Mr. Wiesel for many years. I am among his greatest admirers and I subscribe to your description of him as a national treasure. Just through the grace of God is he with us, when you listen and understand his experiences.

Mr. Chairman, I want to make a brief opening statement about this hearing because it is of such great importance to me. My background is thankfully not similar to Elie Wiesel's but not far away from it either.

Today the Senate Foreign Relations Committee is continuing what I strongly hope will be the last chapter in the prolonged Senate consideration of the Genocide Treaty. I will speak briefly because I do not want to prolong the action any longer, as I have noted.

Mr. Chairman, it was 40 years ago this year, as a matter of fact in May, that the concentration camps of Nazi Germany were liberated. The Allied armies flung open the doors of those awful camps and closed the doors to the gas chambers where the most systematic and drastic genocide in history had occurred. Most of my family were victims of genocide; none of them who remained in Europe survived, though luckily all my immediate family came out.

Among the more than 6 million Jews who were killed by the Nazi Holocaust were indeed scores and scores of people in my family, none of whom I ever knew because I left Germany when I was 2. My father had the extraordinary foresight to come home the day Hitler came into power and say that we would leave Germany. We left 6 months later, after he wound up his affairs. We went on a "vacation" to Czechoslovakia, from which we never returned.

And then we had to go from country to country, Mr. Chairman, because we came from the border of Germany-Poland and we always were classified under the Polish quota, and the Polish quota was always full. And finally, after the fifth or sixth country, my father was able to convince an American consul that we should come under the German quota, so we were able to come.

And it is really remarkable that with that kind of background I should be here, and it is a great testimony to our democracy that I now sit at this table as part of these proceedings.

As a part of the worldwide reaction to the Holocaust, the Genocide Convention was drafted and ratified by 96 nations, but regretfully, not the United States. We have had the Genocide Convention—and I will not go through the history of it—before us time and again over many years. Finally we made some progress, with the help of the distinguished Senator from North Carolina who was on the floor at the very end of the 98th Congress—a time when it is as a practical matter very difficult to complete action on a resolution or on anything that has controversy to it. Hopefully we will now be able to bring it to the floor at an early date and pass it this year as we really should.

I realize that there is strong emotion against the treaty in some quarters. Some of those strong emotions were felt by people in this administration. But I think that there are now adequate safe-

guards, and it is indeed backed by the American Bar Association and many legal scholars.

Passing the Genocide Convention unfortunately will not thereby end genocide. It will not bring back the Jews of Europe or the Gypsies or the Ukrainians of the 1930's, the Armenians of the First World War era, or more recently the Cambodians. But it is important that we try to strengthen the weight of international against any such repetition of genocide, and it is important that this country, which is the leader of the free world really holds the torch for all of the free people of the world, pass the Genocide Convention.

So I commend the chairman for chairing this hearing and his effort to bring the Genocide Convention to the floor for a favorable vote.

I hope we can move quickly. This is certainly the year for action.

Thank you, Mr. Chairman.

Senator HELMS. Thank you.

Senator DODD. Mr. Chairman?

Senator HELMS. Yes, Senator?

Senator DODD. Just very briefly because Mr. Wiesel does have to leave. But I wanted to join you and my colleague from Minnesota in welcoming him as well as all of the panel. If the rest of the panel will permit, I want to extend a special welcome to Elie Wiesel who is indeed a national treasure. I do not know of another human being, not only in this country but throughout the world today, who speaks with as much conviction, compassion, and meaning as he does when it comes to the issue of genocide. He has been recognized by this Congress, one of only a handful of people in the history of the United States for his contribution to humanity, with the casting of a gold medal which received unanimous support, from Republicans and Democrats alike. It truly is one of the highest honors for this committee to welcome him and to hear his testimony amd remarks. I am very proud to call him a friend.

Welcome.

Senator HELMS. Well, sir, you have been properly introduced. We are delighted to hear from you.

Welcome.

STATEMENT OF HON. ELIE WIESEL, PROFESSOR, BOSTON UNIVERSITY

Mr. WIESEL. Mr. Chairman, Senator Boschwitz, Senator Dodd, I thank you very much not only for what you said so graciously about me and my work, but for inviting me to appear before your committee today to give testimony on an issue that seems to me of vital importance to our generation and to the world today.

I speak to you not as a professor of law—I am not a professor of law—nor as a professor of political science—I am not a professor of political science. I am a professor in the humanities, and I would like to speak to you, Mr. Chairman and my friends, in the name of humanity. And it is in the name of humanity that I humbly urge you to approve this treaty.

I speak to you as an American. I came here, like the Senator, as a refugee, stateless person, without passport, and it is in this country that I found haven and hope and all the possibilities offered a

young man, to work and to try to justify his work for the sake of his contemporaries in this nation and outside of this nation.

As a Jew, I grew up believing in justice and carrying with me memories of fire and anguish and trying to do something with those memories of fire and anguish in order to reduce fire and to curtail anguish.

But above all, Mr. Chairman, I speak as a witness. I speak as someone who has seen genocide at work. Of all my predecessors here at this table who have the privilege to speak to you and before you, I think I am the only one who has seen the results and the workings of genocide. I have seen it recently in Cambodia where I went to see what was happening. I have seen in a way the Miskito Indians and their suffering. But above all, what I have seen from 40-odd years ago should not be seen nor endured by anyone alive ever.

And this is why I came to be with you today.

It happened some 40-odd years ago, Mr. Chairman. In Biblical terms, as surely you know, 40 years mark a generation. So a generation ago hundreds and hundreds of communities were wiped out in a tempest of blood and steel and reduced to ashes. When the Jews of my town arrived at the place unknown to us then, Auschwitz, the death factories annihilated 10,000 human beings a day. At times their success was so great that the figure was much higher, 17,000; and once they recorded for their history 22,000 a day.

Mr. Chairman, I have seen the flames. I have seen the flames rising to nocturnal heavens; I have seen parents and children, teachers and their disciples, dreamers and their dreams, and woe unto me, I have seen children thrown alive in the flames. I have seen all of them vanish in the night as part of a plan, of a program conceived and executed by criminal minds that have corrupted the law and poisoned the hearts in their own land and the lands that they had criminally occupied.

Then it was called the final solution. Today it is called genocide.

Mr. Chairman, it is the honor of our country to have lead the war, and what a heroic and noble war, against those who practiced genocide. Tens of thousands of young Americans have given their lives to defeat Nazis, and their war, our war, was not a political war. It was a moral war. And therefore, it is still being glorified and extolled by all of us with justified pride.

I submit to you, Mr. Chairman, friends, that my plea today is also morally inspired and not politically. I am governed by moral considerations only. Though a consequence of political and economic machinations, genocide transcends them all and becomes as a reminder and warning, a powerful call to conscience, and therefore, I urge you to ratify the convention against genocide. In doing so you will declare for all to hear, yes, crimes against entire peoples did indeed occur.

I insist on that, Mr. Chairman, because we live now in a time where morally perturbed minds all over the world, even in our own country, to our embarrassment and shame, dare to claim that it did not occur, that Jewish people did not die in gas chambers. And what really do they think? We are still here. What happened to our people? But what happened to our parents? What happened to the 15,000 Jews of my city? And what happened to the 10,000 cities

in Eastern Europe? Yet they place us in an untenable position that we have to defend our own testimony and say yes, it happened.

We don't do it with pleasure. We do not like to open wounds in public.

So to accept this convention, Mr. Chairman and friends, would serve a warning, yes, what we say, what we witnesses say is true, we are true witnesses, and this would be an act of morality, Mr. Chairman, that all of us would appreciate fully and totally.

Furthermore, in adopting this convention you will say that yes, it occurred, but it must never occur again, ever. By evoking the past, you will protect not only the memory of humankind but also its future. You will protect our children and their children from further shame and death.

Naturally, although I am a humanist, I am not excessively naive, not to the point of assuming that laws, however lofty, could stop planned mass murder, but I am certain that the absence of such laws would encourage mass murder as it has in the past.

Do I need to remind you, who know so much of history, that Hitler and Himmler and Eichmann and their acolytes were convinced that what they were doing was decent, legal, and even beneficial to society? In his diaries, Goebbels, the arch propagandist for Hitler, mentioned his conviction that the Allies were pleased, he said it, that the Allies were pleased with the final solution's theoreticians and practitioners for doing the dirty work for them.

The fact that the killers could kill and go on killing, without protest or interference from the outside world was interpreted in Berlin as tacit consent to their policies.

Well, that doesn't mean that if the law were to be accepted and ratified, as I am sure it will, a law on genocide would stop future attempts to commit genocide against other people. But at least we, as a moral Nation whose memories are alive, must make the statement that we are against genocide, that we cannot tolerate a world in which genocide is being perpetrated, and whoever engages in genocide, wherever that is, places himself outside the human community.

Now, why has this convention not been ratified by the United States? I told you, I am not a political scientist; I don't know. But I can tell you as a witness in all sincerity, Mr. Chairman and friends, this question, why not, has been a permanent trouble to us, to me. Our attitude is being questioned both at home, in schools, and abroad, wherever I go.

I teach in other universities, in France, and in Scandinavia. After all, that is my vocation. I am a passionate teacher. I believe that what we have received we must communicate. And I am proud to appear everywhere as a teacher from an American university who is involved in our political life and who believes in our system and in our ideals. But when they ask me why, explain to me why hasn't the United States ratified the convention, what could I say? And in my own schools here in the United States, when my students ask me, you who preach humanism, and you who glorify the moral asset, the moral conviction of our Nation, how do you explain that we have not ratified for 19 years something which is so simple and urgent and vital, I, their teacher, find it difficult to come up with a logical answer.

Therefore, I urge you to give me that answer, the right answer, and reaffirm our common belief that we have been and remain a nation governed by moral principles. When those principles were jeopardized, we had the courage to defend them. Now I am asking you, isn't genocide the greatest threat to those principles? Isn't genocide the greatest peril to civilization's ideals and visions of peace and compassion?

A French philosopher, Jean Rostand, once remarked, and I quote him, "Kill a man and you are an assassin. Kill a town and you are a conquerer. Kill a people and you are a god."

Now, isn't it our obligation to stand up to those who wish to become gods by murdering people?

Mr. Chairman and distinguished Senators, murder is evil. We all know that. But genocide is absolute evil, and therefore, we have no choice there; we as citizens of this country and teachers to our generation, both in the field of politics, of statesmanship and education, we must tell the young people today, yes, we are against absolute evil, and we are absolutely against that evil.

To outlaw genocide means to justify our faith in faith. We owe it to our children, and we must tell them that we shall do whatever we can to see to it that they will never be confronted by the darkness that is piercing our light and by the wounds that plague our nightmares.

I know the Genocide Convention will not bring back the dead. Mr. Chairman, friends, I know that. The dead, it is too late for the dead. But at least in signing such a convention we could remember the dead without shame. Not to remember them would mean to betray them and betray ourselves.

If we do not remember them, we, too, shall be forgotten.

In conclusion, Mr. Chairman, and in thanking you for your graciousness and kindness for listening to me this afternoon, I urge you that the Genocide Convention, when ratified, would become not only an act of justice, but above all, a solemn and noble act of remembering.

I thank you.

Senator HELMS. Thank you.

Let the Chair suggest that we have one round of 3 minutes each with questions directed only to Mr. Wiesel, because he must go, and then the other gentlemen, if they will be patient with us. We also have another panel after this one.

But let me say to you, sir, I have never heard a more eloquent message. It has been worth this entire day just to hear you, and I thank you.

Your sensitivity toward the suffering of the Jewish people has been clearly displayed once more, and I am almost hesitant to ask a question or two, but let me do so as to the meaning and effect of genocide.

First of all, do you find it distressing that the country most often accused of genocide happens to be Israel, and that these accusations most often come from the very people who do not believe that Israel should be allowed to exist?

Mr. WIESEL. Mr. Chairman, Israel, which is the dream of the Jewish people, has often been a target of genocide, not a perpetrator of genocide. Had Hitler and his acolytes succeeded, every single

Jew everywhere on the surface of the Earth, in the United States or in Israel or anywhere would have ceased to exist. Clearly, Mr. Chairman, a people with such memories, a people who saw what genocide can do and does, not only to its victims but to its perpetrators, do you really feel that there is any possibility of temptation in the Jewish people or in Israel for a semblance of genocide?

Why have these accusations been leveled? Because Israel has been isolated for reasons that have to do with metaphysical considerations as well as political considerations, and Israel has many enemies. Well, Israel is a lonely nation. It does not belong to any bloc, and I think it has a sense of integrity which angers many opponents.

The fact that it has been accused of genocide only speaks poorly of the state of our world today, but not of Israel.

Senator HELMS. Do you think that these accusations will be harmful to Israel in the long pull?

Mr. WIESEL. Mr. Chairman, I thank you for your questions because you force me to reflect on them. I do not think so. I think Israel has itself signed the convention. I have friends in Israel and friends in Government, friends in Parliament, and I have spoken to them, and all of them believe that it is essential for the whole world to adopt a convention against genocide. Israel is not afraid at all; Israel is not afraid of false accusations.

For the last 2,000 years the Jewish people have endured enough false accusations and slander, and yet we survive.

Senator HELMS. Thank you very much.

Senator Dodd.

Senator DODD. Thank you, Mr. Chairman.

And I, like you, am concerned that asking a question of Elie after his statement may detract from it in some way. I hope that is not the case.

Elie, I have often quoted you before audiences in talking about the sin of silence, and that during the Holocaust the greatest sin, a greater sin in many ways almost than the act itself, was the silence of others who knew and said nothing.

I wonder if you might equate the delay, the inaction, if you will, on the Genocide Convention in light of ongoing atrocities around the world and whether or not that sin of silence that you have spoken of so eloquently in the past, is once again being committed by a generation that has refused to have this country speak out on something as important as a convention which would at least attempt to bring to the court of public opinion the crime of genocide.

Mr. WIESEL. Senator Dodd, my friend, yes and no. Yes, silence in times of danger is a sin because silence never helps the victim. It only helps the executioner. So the silence of the United States whenever genocide is being attempted or implemented, of course, would place us in a situation of embarrassment and shame.

However, there are voices that are being heard. Each time anything happens in the world, there are voices in the United States, and we are proud that there are such voices to speak up against. As far as I remember since I came to the United States, there wasn't a tragedy in the world where in a way I wasn't involved, I tried to help, but I was never alone. I wasn't even the first because all I had to do was to open my ears and my eyes and follow those

people who are obsessed with justice, and they speak up against any injustice.

So I believe that if, if, God forbid, this Convention is not ratified, it will be interpreted as indifference and silence, and then it will be a sad day for our Nation.

Senator DODD. Thank you. Thank you very much.

Senator BOSCHWITZ [presiding]. Mr. Wiesel, it is interesting to note that you are here today on March 5, the day before Purim. It is a holiday in our tradition that recalls one of the early efforts to attempt such a final solution with respect to the Jewish people. We celebrate a victory of—and I have heard you speak about this, how the uncle of Queen Ester gave her the strength to go to the King and prevent a genocide from happening many thousands of years ago.

I might say that in that connection, we are having tomorrow evening a mixer here at my initiation for young Jewish singles so that they can meet one another and hopefully continue the traditions of our people. One has to do what he can to introduce young people to one another in this world. Having four sons, I am very active in that regard. I might say that any in the audience who are young and single should call my office, young being from 20 to 70, and they are welcome to come tomorrow evening to a mixer.

In any case, it is very appropriate that we hear from you today on the eve of Purim, which is a holiday celebrating the failure of an earlier effort to eliminate the Jewish people.

And I know, Senator Dodd, that your father was very active, was he not, in the trials that succeeded the Second World War.

Senator DODD. He was the chief prosecutor under Robert Jackson at Nuremberg.

Senator BOSCHWITZ. At Nuremberg, and so that you too have grown up with a sense of all this.

But there is a feeling and a fear that the United States will be hailed and dragged into the World Court just as my colleague, Senator Helms has suggested that the Israelis will be hailed into court and brought to the bar with spurious charges, that if we sign this Convention, we would be hauled into court by those in the world who are not our friends, and brought to the bar on some sort of charge.

Does this concern you as you consider the Genocide Convention?

Mr. WIESEL. Senator Boschwitz, each time we meet, a miracle occurs. The last time we met in your own town, it was Channukah. So now we meet on Purim. Maybe next time will be Passover.

Senator BOSCHWITZ. That is right.

Mr. WIESEL. But no, Senator Boschwitz, I am not concerned because I do not feel that the United States should feel so insecure. Really, are we that insecure that we are afraid of what some nation would think of us or say about us?

Senator BOSCHWITZ. If you would yield for just a moment. Senator Helms, while you were out I asked Professor Wiesel the question of whether or not we in the United States should be concerned that perhaps some charge, spurious though it may be, would be brought against us, and that we would be brought to the bar, and should we be concerned about that eventuality.

Mr. WIESEL. Mr. Chairman, what I try to answer is that we in the United States I believe represent a moral force, and the United States is strong, is morally strong and should not feel so insecure.

Are we really afraid of propaganda? Since when are we afraid of propaganda? If it is a matter of propaganda, then we lose because the Russians are better than that. If it comes to truth, there we have a chance of winning. But in propaganda, the Russians and all their agencies and the Communist empire and its agencies, they do nothing else, but the United States, fortunately for us, has a certain concept of truth, and therefore we can take the risk.

I am convinced that when we adopt this convention, we will only take pride in it and not sorrow.

Senator HELMS [presiding]. If the Senator would yield, I do not disagree with you at all about the moral intent of the United States, or the strength, but on the other hand, we have a treaty responsibility here. The United States has entered into some defective treaties on a number of occasions. While we all agree on the question of genocide, and this Senator agrees on the question of a Genocide Treaty, my duty as I see it may be a little bit different from someone who is not in the Senate. I want it to be as strong and as protective of the United States as possible. Otherwise we will have difficulties down the road.

But again, I want to tell you that I not only enjoyed your testimony, I was inspired by it. You are a fine man.

Thank you very much.

Mr. WIESEL. I thank you very much.

Senator HELMS. I got you out 5 minutes ahead of your time. [Pause.]

I will say to Mr. Shepherd, Mr. Moore, Mr. Rees, and Mr. Friedlander, that we appreciate your patience, and we will not keep you too long.

Mr. SHEPHERD. We were tempted to show our appreciation with a bit of applause. Professor Wiesel, you said it for us, too—your statement was very inspiring.

Senator HELMS. Thank you, sir.

Senator Dodd, since you are the only other Senator here at the moment, let me say that I find we have two more panels, not one, and I was wondering if you would agree to maybe 6 or 7 minutes of questioning so that these gentlemen can get away.

Senator DODD. Sure, absolutely.

Mr. Chairman, I thank you and the panel for your patience. The others who have been sitting in the room here waiting all day. We wait a long time, but they wait longer—for letting us question Mr. Wiesel. You are all very tolerant, and we appreciate that.

Senator HELMS. Absolutely.

Mr. Shepherd, let me review your testimony for a moment. You mentioned that the American Bar Association for quite a while was opposed to ratification of this treaty.

Incidentally, I might say parenthetically that the first time I came to this city, I came as an administrative assistant to one of your predecessors, a distinguished North Carolinian, Willis Smith, who was president of the ABA. I have great respect for the ABA.

Would you tell me just for the record what was the rationale behind the ABA's opposition at that time when it did oppose the treaty?

Mr. SHEPHERD. Well, of course, I was not serving in the House of Delegates when the issue came up originally, but I was there later when some of the members of the bar led the fight in opposition. We were trying to be helpful in the deliberations at all times by pointing out that all matters of an international nature bear close scrutiny.

And so at that time and before we had the conditions and the resolutions which we now have, the bar spoke out rather quickly and said that in the manner in which the convention was submitted, which is legalese or lawyer talk for saying that it needed to be redrafted, they opposed it. It was not until later, and of course other people were there, when the current treaty and the clarifying declaration and understandings were before our House, that we found that it was fully acceptable.

And I suspect, too, in fairness I should say that during that period of time and after, people who we identify as being antithetical to the best desires of our country were using the treaty as a propaganda weapon against the United States. I suspect that in the debates, when it finally passed, some of these factors had a bearing on our overwhelming endorsement of the treaty.

So it was the overall picture, I think, which had changed through the years.

Senator HELMS. Fine.

Mr. SHEPHERD. Maybe Professor Moore, who has lived with it longer than I have, could supplement my response. I do not mean he is older, but I mean he has worked on it longer.

Mr. MOORE. This is my third time testifying on behalf of the American Bar Association for Senate advice and consent to the Genocide Convention.

Mr. Chairman, I think one of the major differences is that events change and our knowledge of the law changes. Just to give one example, the world map that hangs over the Senate Foreign Relations Committee chambers does not include the midocean ridges of the United States because at the time this map was printed we did not know about the midocean ridges, and at the time the American Bar Association adopted its position in 1950, initially in opposition to the Genocide Convention, it was a time you will recall also of the Bricker amendment battle, and one of the central issues in that battle was the uncertainty as to whether the—the then uncertainty as to whether the Constitution of the United States would prevail over a treaty that might be inconsistent, a very fundamental principle.

And in 1957 the case of *Reed* v. *Covert* was decided by the Supreme Court, and that was one of the very major changes. We now know that as a clear principle of constitutional law, a treaty cannot override the Constitution.

I might add, by the way, that the early confusion was based on the difference in the language of the Constitution between the notion that laws are made under the authority of the Constitution of the United States and a treaty is made pursuant to the authority of the United States. When the Supreme Court in *Reed* v.

Covert looked into the drafting history of that, what they discovered is that the framers had to use that terminology because they did not want all of the treaties entered into by the earlier U.S. Confederation to lapse, particularly the treaty that ended our Revolutionary War. They wanted that treaty to continue, and therefore they could not use the language "under the Constitution of the United States." But the Supreme Court held very clearly in *Reed* v. *Covert*, that it is unquestioned constitutional law today that the Constitution clearly prevails.

Senator HELMS. OK. I have only 7 minutes.

Has your House of Delegates considered an article IX reservation since the ICJ *Nicaragua* case?

Mr. SHEPHERD. No, they have not, Senator, and I could not predict exactly what the House might do in view of that. Consequently, I do not want to be heard to say that I am speaking as to that issue or reflecting the attitude of the House of Delegates. It has not been brought to us, so the answer is no.

Senator HELMS. I have one final question.

Do you share my respect for Sam J. Ervin, Jr., as a constitutional scholar?

Mr. SHEPHERD. At least share it, Senator.

Senator HELMS. I see the yellow light is on.

Dr. Friedlander, does the Genocide Convention carry out the premise upon which it was first conceived, that is to say, does it apply to the mass killing of people by totalitarian governments?

Mr. FRIEDLANDER. No, Senator, I believe it does not. The way it is phrased, it centers on and specifies individuals. Individuals, I firmly believe, cannot engage in mass killing. It is states and regimes and governments which murder and torture and barbarize, and that is why I would favor a convention to punish states. Not the convention we have now that centers on individuals and containing language which I believe, particularly under article II, is vague and overbroad.

Senator HELMS. So you do think the complicity of government is essential.

Mr. FRIEDLANDER. I agree with you—yes, and I'm in accord with your first condition in which complicity of governments would be required in order to have a crime of genocide.

Senator HELMS. Very well.

Now, let me make clear that unanimous consent was obtained this morning for all Senators who are here at the moment, and others who are not, to submit questions in writing, and if you would favor us with your responses, we would appreciate it.

Senator Dodd?

Senator DODD. Thank you very much, Mr. Chairman.

Let me, if I may, Mr. Shepherd, pick up on the point that my colleague and friend Senator Helms was raising about the Nicaraguan situation.

Do you have any reason to believe that the ABA would change its position with regard to article IX as a result of the *Nicaraguan* decision, that is, with regard to the Genocide Convention?

Mr. SHEPHERD. I have no reason to believe they would, but on the other hand, in fairness, I cannot tell you that they would not because they have not heard the debate. I do know that many of the

lawyers of the American Bar Association were troubled by what our country felt—what the leaders felt they had to do in that situation—because we have long been outspokesmen in favor of the World Court and the International Rule of Law.

So that is about as much as I can say on that.

Senator DODD. I read your statement carefully, and as I understand it, it is the position of the ABA that any reservations with regard to article IX would be opposed by the ABA?

Mr. SHEPHERD. That is correct. I said in my statement, I tried to make it clear that I felt that we should move now based on the policy of the American Bar Association, well enunciated, and of course, articulated by some of our finest speakers and scholars on the subject, but if the Senate in its wisdom feels that it must decide differently, why, you are the ones who have to determine that.

Senator DODD. We have to decide that.

As far as reservations go, the one particular reservation suggested by the chairman of the committee, Senator Lugar, regarding excusing or recusing ourselves from the jurisdiction of the Court, the ABA is opposed to that reservation.

Mr. SHEPHERD. Yes, Senator.

Senator DODD. Senator Helms has raised a question which concerns the Bricker amendment. I think it is a spinoff of the Bricker amendment having to do with a provision that he has suggested he would offer either in committee or on the floor, and you correct me, Jesse, if I am misstating it, that would say in effect that nothing in this treaty could do anything that would abrogate any provision of the Constitution.

His point and others' is, if it does not mean anything, if it does not have any effect in light of Supreme Court decisions—I would ask you, Mr. Moore, to respond to this as well—what harm would it be to have that kind of provision stated here? If it does not do anything, it is not harmful. It only restates what is the law, what danger, what harm does it pose in terms of the effect of the Convention?

Is there a legal reason, some logical reason to be opposed to that kind of language?

Mr. SHEPHERD. Well, I am doing this as a volunteer. I am not an expert on propaganda or psychology, but my feeling would be that it might be used by those who are out to harm the United States in some very important ways. I will not burden you, but when I was in the Soviet Union, the same question was asked of me that was asked of Professor Wiesel just a moment ago. If we put these restrictions, on or try to, it will certainly be debated in an unfavorable light to the United States.

And then I think probably as Senator Helms says, it has no different legal effect. So the question that comes to my mind is, why should we pay that price?

Senator DODD. How about you, Mr. Moore? Do you have any——

Mr. MOORE. I think it is the position of the American Bar Association that no additional understandings or reservations or declarations are necessary. With respect to that particular one you have just discussed, I think that since——

Senator DODD. I do not know if I stated it correctly. Did I have the essence of it, Jesse?

Senator HELMS. Beg pardon?

Senator DODD. Do I have the essence of that amendment of yours that you proposed?

Senator HELMS. Yes. Go ahead.

Mr. MOORE. Since *Reid* v. *Covert*, as I have indicated, is good constitutional law in the United States, it would seem completely unnecessary to have such an understanding. I think it also might invite a negative implication in terms of all of our other treaties. Why should we put that kind of provision in this treaty and not have it in all of the others? What does that mean? How should other nations interpret that with respect to other conventions?

Finally, though, it would depend on the phraseology. I have seen many differing kinds of such provisions. Some of the phraseology that I have seen—and I have not seen the chairman's phraseology on this—would in fact invite international entry into the question of American constitutional law. And I think that would not be a useful thing to do in general.

Let me also add on the question of the article IX reservation that at least those that I have talked to the issue understand the great importance of having this convention acceded to by the United States at this time, and they are not oblivious to the pressures, the political pressures on the Hill. But it is our professional opinion and our opinion in terms of the national security and foreign policy interests of the United States that there ought not to be a reservation under article IX.

Senator DODD. What I might do is in a question submit to both of you the language that was originally submitted, this proposed language by Senator Helms, and ask you to take a look at it and respond in writing.

The other question has to do with the reservation. I would ask you as well to respond, having thought about it somewhat. I suggested this morning that as an alternative to the Lugar suggestion that a reservation which would impose a reciprocity—that is, where another nation had a reservation that would exclude itself from jurisdiction of the court—that we would have a reciprocal reservation with that particular country or nation.

I understand the position that you prefer that no reservations be included, but I would ask you to examine that one and to give some sort of response as to whether or not that would at least maybe be more acceptable if we are in a position of having to choose one or the other as a possibility.

Mr. SHEPHERD. Well, I appreciate that opportunity, Senator, because that is what the American Bar hopes to do, is be of assistance to the U.S. Senate. That is our only purpose in appearing here, and we are very happy to have that opportunity. Senator Dodd, Professor Moore will submit for the record our responses to both those questions.

Mr. REES. Senator, I also have to catch a plane, and unless anyone has any questions that are especially directed to me, I——

Senator HELMS. Well, I was going to compliment all four of you on your testimony. I wanted to ask you one question before you leave.

Mr. REES. OK.

Senator HELMS. And then if you have any further questions, that would be fine.

The International Court says that the Genocide Convention applies to all nations, whether or not they have signed it. Now, what legal effect does this statement by the World Court have?

Mr. REES. Well, if they have said that at all, it is, as Professor Moore says, a dictum. There has not been a holding of the court in any case, and in any case there is no doctrine of stare decisis in international law, so a statement in a World Court opinion does not have any legal effect.

I think that there is evidence that genocide of some sort could be regarded as a crime at customary international law, and I would simply like to reiterate certainly some things that are prohibited by the Genocide Convention are also crimes at customary international law, without reference to Professor Friedlander's point that some other things may not be, and certainly we have not exactly acquiesced in this rule by example always. I mean we have, the United States has, but not every country. So if the test of a customary rule is what people have actually done, then there is the case that there is not any customary international rule against genocide. If the test, however, is whether they have formally objected verbally to the existence of such a rule, then of course it is a rule of customary international law.

Now, what that means is that without regard to whether the World Court can bring us in a case and hold us liable; what that means is that we are bound by that under the law of nations, that we will have violated the law of nations if we commit genocide within whatever definition has become customary international law.

I think that Professor Moore's point is well taken, that it is conceivable that a case under the compulsory jurisdiction of the World Court could be brought, that some policy of ours amounts to cultural genocide, and that that is forbidden by some rule of international law, and that that is to be worried about. I guess I do not agree that we would be safer with this definition, because I am not at all sure that it is as precise as Professor Moore thinks that it is. I think it also has some vagueness and some ambiguity that need to be fixed up.

But I think that if we ratified subject to somewhat more careful understandings and perhaps reservations than the ones that presently exist, and particularly if we also accepted to the jurisdiction of the World Court in this matter, we might have the best of all worlds. We might eliminate the possibility that we could be held to have acquiesced in some other vaguer standard of genocide and also have the positive advantages of being on record in favor of the existence of the international crime.

Senator HELMS. Dr. Friedlander, I detected that you have some interest in that question?

Mr. FRIEDLANDER. I do indeed, Mr. Chairman. I would just like to add first that Professor Rees is correct that on two occasions the International Court of Justice in the Genocide Reservations case and in the Barcelona Traction case said in dicta that the Genocide Convention was universal, and all states were obliged to adhere to its provisions. But the International Court of Justice has also said

on a number of occasions, I believe the most recent instance being the Namibia case, that it decides disputes on a case-by-case basis; that there is no stare decisis; and that there is no doctrine of precedent in International Court of Justice jurisprudence.

However, I would also like to point out a very important aspect of the International Court that I do not think has been fully touched upon here. That is, our concern is in a dispute with another country, when the dispute goes before the International Court to be decided by the International Court. This raises two points.

The first is that a court which in prior times has said that the Convention is binding upon all states parties everywhere is not likely to give a narrow ruling to any dispute under the Convention at the time the convention is submitted to it.

The second thing is that these are disputes over matters of intepretation and application. It should be remembered again that the convention deals with individuals, and that another state party is not going to take the United States before the International Court on a charge of genocide; it would take the United States before the International Court on matters involving the interpretation of the crime of genocide or crimes related to specific individuals who are charged.

Senator HELMS. Thank you. Chris.

Senator DODD. Thank you, Mr. Chairman. I have a letter that I had sent to the chairman regarding Mr. Wiesel's appearance here. I would like to ask unanimous consent that that be made a part of the record at this point.

Senator HELMS. It will be without objection.

[The letter referred to follows:]

UNITED STATES SENATE,
Washington, DC, February 20, 1985.

Senator RICHARD LUGAR,
Chairman, Senate Foreign Relations Committee, U.S. Senate.

DEAR MR. CHAIRMAN: I am pleased to know that on March 5, the Foreign Relations Committee will move to the consideration of the Genocide Convention. Such expeditious action is very much in keeping with both the letter and the spirit of S. Res. 478, which as you know passed the Senate last year by the overwhelming vote of 87 to 2.

As you begin to think about witnesses for the March 5 hearing, I would urge you to invite Dr. Elie Wiesel, the noted author, teacher and humanitarian. Dr. Wiesel is currently the Director of the Holocaust Council, and throughout his illustrious academic and literary careers, he has worked tirelessly to keep the memory of Holocaust alive by focusing attention on the tireless question of man's inhumanity to man.

Accordingly, as we mark the 40th anniversary of VE Day and the liberation of the Holocaust survivors, and as the Committee prepares for additional hearings on the Genocide Convention, I believe it would be both fitting and appropriate to hear from Dr. Wiesel during the Committee session on March 5.

I appreciate your consideration of this request, and I look forward to hearing from you at your earliest convenience.

Sincerely,

CHRISTOPHER J. DODD,
U.S. Senator.

Senator DODD. We then had two resolutions, Mr. Chairman, one that we adopted at the end of the last session, that I would like to be made a part of the record and another which the committee approved in September of last year.

Senator HELMS. I think it already is, but we will be sure to include it.

Senator DODD. There were also rollcall votes on those as well that I will put in the record. And I thank you, Mr. Chairman.

[The material referred to follows:]

[From the Committee on Foreign Relations Business Meeting, Sept. 19, 1984]

Senator DODD. Mr. Chairman, could I move that resolution of mine while we have everyone here, so that we could deal with that one?

The CHAIRMAN. Yes.

The Chair recognized Senator Dodd for purposes of offering a resolution, which I would like to co-sponsor.

Senator DODD. Thank you, Mr. Chairman.

You have it in front of you. It is self-explanatory. Again, it is to try to do whatever we can to urge the leadership——

The CHAIRMAN. Excuse me. Senator Pell will also co-sponsor it.

Senator DODD. Thank you. To urge the earliest possible consideration of the treaty. And I urge the Chair, if it becomes necessary, to hold this over a day or so if we can get this done. We are doing TV in the Senate right now and our distinguished colleague from Maryland is leading the charge on that. I do not minimize the importance of that issue, but by comparison, frankly, this ought to be the most important issue or one of the most important issues that we take up before we leave.

So I compliment you for your willingness to do that, Mr. Chairman. I have nothing further. I would move adoption of my resolution.

Senator HELMS. If the Senator would yield, I think it important that we join the Soviet Union in being against genocide.

The CHAIRMAN. Is there further comment on the Dodd resolution, then?

[No response.]

The CHAIRMAN. If not, all those in favor say aye.

[A chorus of ayes.]

The CHAIRMAN. Opposed?

[No response.]

The CHAIRMAN. The motion is carried.

Senator DODD. Mr. Chairman, may I have a roll call vote on that? I think it is important.

The CHAIRMAN. All right. A record vote has been asked for. But first, may we ask Senator Glenn if he would care to cast his vote for the genocide treaty itself?

Senator GLENN. I appreciate the opportunity, Mr. Chairman. I vote in favor of it.

The CHAIRMAN. The vote then is 15 ayes, one present, and no nays.

Senator Dodd has asked for a roll call vote. The Clerk will call the roll.

Mr. KEANEY. Mr. Baker.

[No response.]

Mr. KEANEY. Mr. Helms.

Senator HELMS. Aye.

Mr. KEANEY. Mr. Lugar.

Senator LUGAR. Aye.

Mr. KEANEY. Mr. Mathias.

Senator MATHIAS. Aye.

Mr. KEANEY. Mrs. Kassebaum.

Senator KASSEBAUM. Aye.

Mr. KEANEY. Mr. Boschwitz.

Senator BOSCHWITZ. Aye.

Mr. KEANEY. Mr. Pressler.

Senator PRESSLER. Aye.

Mr. KEANEY. Mr. Murkowski.

Senator MURKOWSKI. Aye.

Mr. KEANEY. Mrs. Hawkins.

[No response.] (Polled aye.)

Mr. KEANEY. Mr. Pell.

Senator PELL. Aye.

Mr. KEANEY. Mr. Biden.

Senator PELL. Aye by proxy.

Mr. KEANEY. Mr. Glenn.

Senator GLENN. Aye.

Mr. KEANEY. Mr. Sarbanes.

Senator SARBANES. Aye.
Mr. KEANEY. Mr. Zorinsky.
[No response.] (Polled aye.)
Mr. KEANEY. Mr. Tsongas.
Senator PELL. Aye by proxy.
Mr. KEANEY. Mr. Cranston.
Senator CRANSTON. Aye.
Mr. KEANEY. Mr. Dodd.
Senator DODD. Aye.
Mr. KEANEY. Mr. Chairman.
The CHAIRMAN. Aye.
The ayes are 15[17], there are no nays. The resolution is unanimously carried. This vote and of course the genocide treaty vote itself will be kept open until the close of business today.

* * * * * * *

[S. Res. 447 (Exec.), 98th Cong. 2d sess.]

RESOLUTION URGING THE SENATE TO ACT ON THE GENOCIDE CONVENTION PRIOR TO ADJOURNMENT

Resolved, That the Senate Committee on Foreign Relations hereby urges the Senate leadership to proceed immediately to the consideration of the Genocide Convention (Ex. O, 81-1) and seek to complete action on it prior to adjournment.

[S. Res. 478 (Exec.), 98th Cong. 2d sess.]

EXECUTIVE RESOLUTION EXPRESSING THE SENSE OF THE SENATE IN SUPPORT OF THE PRINCIPLES CONTAINED IN THE CONVENTION AGAINST GENOCIDE

Resolved, That the Senate hereby expresses its support for the principles embodied in the Convention on the Prevention and Punishment of the Crime of Genocide, signed on behalf of the United States on December 11, 1948 (Executive O, Eighty-first Congress, first session), and declares its intention to act expeditiously thereon in the first session of the Ninety-ninth Congress.

[From the Congressional Record, Oct. 11, 1984]

ROLL CALL VOTE ON S. RES. 478 (EXEC.)

The PRESIDING OFFICER. The question is on agreeing to the resolution.
On this question, the yeas and nays have been ordered, and the clerk will call the roll.
The bill clerk called the roll.
Mr. STEVENS. I announce that the Senator from Maine [Mr. Cohen], the Senator from Arizona [Mr. Goldwater], the Senator from Oregon [Mr. Hatfield], the Senator from Idaho [Mr. McClure], the Senator from Illinois [Mr. Percy], the Senator from Texas [Mr. Tower], and the Senator from Wyoming [Mr. Wallop] are necessarily absent.
I further announce that, if present and voting, the Senator from Oregon [Mr. Hatfield] would vote "yea."
Mr. CRANSTON. I announce that the Senator from Missouri [Mr. Eagleton], the Senator from Kentucky [Mr. Huddleston], the Senator from Massachusetts [Mr. Kennedy], and the Senator from Michigan [Mr. Levin] are necessarily absent.
I further announce that, if present and voting, the Senator from Michigan [Mr. Levin], would vote "yea."
The PRESIDING OFFICER. Are there any other Senators in the Chamber wishing to vote?
The result was announced—yeas 87, nays 2, as follows:

[Rollcall Vote No. 288 Ex.]

YEAS—87

Abdnor	Biden	Burdick
Andrews	Bingaman	Byrd
Armstrong	Boren	Chafee
Baker	Boschwitz	Chiles
Baucus	Bradley	Cochran
Bentsen	Bumpers	Cranston

D'Amato	Humphrey	Proxmire
Danforth	Inouye	Pryor
DeConcini	Jepsen	Quayle
Denton	Johnston	Randolph
Dixon	Kassebaum	Riegle
Dodd	Kasten	Roth
Dole	Lautenberg	Rudman
Domenici	Laxalt	Sarbanes
Durenberger	Leahy	Sasser
Evans	Long	Simpson
Exon	Lugar	Specter
Ford	Mathias	Stafford
Garn	Matsunaga	Stennis
Glenn	Mattingly	Stevens
Gorton	Melcher	Thurmond
Grassley	Metzenbaum	Trible
Hart	Mitchell	Tsongas
Hatch	Moynihan	Wallop
Hawkins	Murkowski	Warner
Hecht	Nickles	Weicker
Heflin	Nunn	Wilson
Heinz	Packwood	Zorinsky
Helms	Pell	
Hollings	Pressler	

NAYS—2

East	Symms

NOT VOTING—11

Cohen	Huddleston	Percy
Eagleton	Kennedy	Tower
Goldwater	Levin	Wallop
Hatfield	McClure	

Senator DODD. Mr. Chairman, I just thank the witnesses.

Senator HELMS. Well, I do, too.

Senator DODD. I am very grateful to you for your time and your patience.

Senator HELMS. Again, the Chair thanks you for your patience.

Our next panel will be two very prominent Americans, Mrs. Phyllis Schlafly, who is president of the Eagle Forum, well known to all of us, and Howard Phillips, who is president and chairman of the Conservative Caucus.

Mrs. Schlafly, will you proceed?

STATEMENT OF PHYLLIS SCHLAFLY, EAGLE FORUM, WASHINGTON, DC

Mrs. SCHLAFLY. Mr. Chairman, my name is Phyllis Schlafly, president of Eagle Forum, a national pro-family membership organization of 70,000 members. I am a member of the bar in Illinois and the District of Columbia.

When a treaty has remained unratified through the administrations of Presidents Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter, it seems appropriate to ask why before rejecting the collective wisdom of the U.S. Senate over 37 years.

Anyone who takes time to read the Genocide Convention can easily see that it is a double-edged piece of propaganda and a constitutional embarrassment.

The Genocide Convention was born in an era when civilized nations were shocked at the enormity of Hitler's genocide against the

Jewish people. Time has not dulled that memory. However, the deletion of the word "political" from the list of groups that can be the victims of genocide means that the Genocide Convention whitewashes the later examples of genocide in Afghanistan, Uganda, Cambodia, Tibet and in the purges carried out in the Soviet Union.

This double standard makes the treaty a fraud. It postures against genocide while giving a clean bill of health to most of those who currently engage in genocide. It makes us a party to that sin of silence in not speaking out against contemporary genocide.

The word "genocide "is commonly understood to mean a government's crime against substantial numbers of people, such as Hitler's killing of the Jews. The Genocide Convention, however, is written to allow criminal charges to be brought against an individual private citizen who is alleged to harm a single person.

The Genocide Convention will allow American citizens to be tried before an international penal tribunal on vague charges such as complicity and causing mental harm. The U.S. Bill of Rights could not protect us in any foreign court.

The Genocide Convention will put our national head in the noose of the World Court, which recently demonstrated its lack of respect for the law by grabbing jurisdiction over a case it had no legal right to take, and then ruling 15 to 1 against the United States.

The terms of the Genocide Convention are so alien to American national interests and individual civil liberties that anyone can see its defects and dangers. In asking us to ratify it, its advocates are asking us to ignore the clear language of the treaty and accept it as a piece of symbolism, as a statement against genocide.

Let us assume, for the sake of argument only, that the Genocide Convention will not put at risk the constitutional rights of American citizens because: (a) the treaty does not really mean what it says; or (b) the timid reservations and understandings suggested by the State Department will protect us; or (c) we can rely on future U.S. Presidents to refuse to obey demands of the World Court, an international penal tribunal, the United Nations, or extradition proceedings.

None of these assumptions can be proven, but let us assume anyway that the Genocide Convention is just a piece of symbolism to put the United States on record against genocide. We then get to the problem that the Genocide Convention is a can of worms which encourages all the symbolism to crawl against us.

Here are some accusations which could be made under the vague and open-ended definitions and terms in the Genocide Convention. Note that some examples would be obnoxious to those on the right of the political spectrum, and some to those on the left. I would hope that all would be obnoxious to those who believe in the constitutional rights of the accused and who object to the United States being used as a whipping boy in international forums.

Washington, DC Mayor Marion Barry accuses President Ronald Reagan of genocide because he continues to do business with South Africa. (Barry already said that.)

American servicemen who serve in military actions overseas, such as Vietnam or Grenada, are held for trial because they delib-

erately inflict conditions of life calculated to bring about physical destruction.

Christian missionaries in Africa and Asia are accused of intent to destroy a religious group.

Americans who distribute contraceptives in Third World countries are accused of measures intended to prevent births within the group.

Abortion clinics and family planning centers in the United States are accused of measures intended to prevent births.

The Soviet Union accuses rulers of the People's Republic of China of imposing measures intended to prevent births because of their forced abortion and other population control actions.

Israel is tried for carrying out a preemptive raid against the Palestine Liberation Organization.

A U.S. Senator or Congressman who praises Israel's self-defense action is accused of public incitement to commit genocide.

The Nestle Corp. is inflicting on the group conditions of life calculated to bring about physical destruction because of its sale of infant formula to Third World countries.

Union Carbide is accused of conspiracy and complicity to commit genocide in India.

Individual American citizens are accused of genocide because of actions involving discrimination against minority groups, school busing, or State legislative action limiting welfare benefits.

Even the ordinary exercise of our broad American rights of free speech could trigger the accusation of causing mental harm to members of a group.

In American courts such charges would be quickly dismissed. International forums, however, are really propaganda forums, as indicated by the recent anti-American actions of the World Court.

Indeed, we can pull out, as the Reagan administration did, from the *Nicaragua* case before the World Court. But who won the propaganda verdict is not clear. Symbolism? The propaganda potential for anti-American symbolism is far greater than for the antigenocide symbolism. Regardless of which side we might find ourselves on in any of these controversies, it would be a national embarrassment to have to defend our case in an international court which, practically by definition, would be anti-American and anti-Israel.

The following are alternative ways to make a statement on genocide in the modern world without leading our Nation into an international setup: One, the U.S. Senate could shelve the treaty and pass a simple resolution of moral purpose, as follows: "The United States condemns genocide as a crime against humanity, particularly the deliberate killing of racial, religious, ethnic, or political groups, whether perpetrated by the Nazis, the Soviet Union, in Asia, in Africa, or elsewhere."

Two, the U.S. Senate could ratify only articles I through V and then pass a U.S. statute making genocide a Federal crime. This would assure that the enforcement mechanism would be subject to our Bill of Rights protections.

Three, the U.S. Senate could ratify the Genocide Convention with the addition of the following amendments: Add to article II(F), "killing substantial numbers of persons for political purposes." Add after article IX: "The United States does not accept the jurisdiction

of the World Court or of any international penal tribunal, and the President is hereby prohibited from accepting such jurisdiction under executive agreement."

Finally, I urge those considering the Genocide Convention to ponder the actual text of the treaty. Anyone reading it article by article can see from its text that it is at best an embarrassment and at worst a trap to ensnare American citizens and our allies.

It should be noted that the advocates of the Genocide Convention who testified here today did not respond to most of the objections raised by opponents.

Mr. Chairman, I ask that my article-by-article explanation of the treaty be printed in double columns at this point in the record. Thank you, Mr. Chairman.

Senator HELMS. Without objection, it will be done. Thank you, Mrs. Schlafly.

[The material referred to follows:]

The Text

ARTICLE I. The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

ARTICLE II. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

ARTICLE III. The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

ARTICLE IV. Persons committing genocide or any of the other acts enumerated in Article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

ARTICLE V. The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.

ARTICLE VI. Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

ARTICLE VII. Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

ARTICLE VIII. Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III.

ARTICLE IX. Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

What The Text Means

Article I makes genocide – whether committed in peace or war – a crime which must be punished. Since soldiers fighting in wartime are NOT exempted, U.S. servicemen who kill or wound enemy troops could be tried and punished in foreign countries.

Article II makes it a crime intentionally to destroy a single member of a specified group; the definition of "destroy, in whole or in part" is open-ended and vague. The crime of causing "mental harm to members of the group" could make you a genocide criminal if you merely exercise your right of free speech. Article II omits "political" groups from the definition of genocide. The Senate successfully deleted the word "political" from the text. Since the Senate claims that all victims of their purges are "enemies of the state", making their intent "political rather than "national, ethnical, racial or religious". Communist genocide is exempted from punishment.

Article III authorizes criminal prosecution not only for "genocide" but also for such vague charges as "conspiracy", "incitement", "attempt" and "complicity" – none of which requires an overt act of actual genocide and could include "acts" of omission. No one knows what "complicity" means, because that term is not used in America as a criminal law.

Article IV provides that "private individuals" can be prosecuted as criminals even though they are NOT government officials and have nothing to do with government action. The Senate successfully deleted from the text the words "with the complicity of government" – so the crime of "genocide" is defined as a personal action rather than a government action.

Article V obligates the United States to "enact" legislation making genocide a crime and further obligates the Federal Government to prosecute and punish public officials and private individuals who may be guilty of criminal homicides, assaults, batteries, and kidnapping that may be covered by the Convention. This would transfer a large area of criminal law and its enforcement from the States to the Federal Government, and cause widespread confusion.

Article VI provides that "persons" accused of crimes can be tried by an "international penal tribunal" – where they would NOT have the protections of the U.S. Bill of Rights such as: the right NOT to be tried as a criminal except after a grand jury indictment; the right to a speedy and public trial; the right to trial by jury; the privilege against self-incrimination; the protection against unreasonable searches; the writ of habeas corpus; and the right NOT to be denied life or liberty without due process of law. If U.S. citizens or servicemen are accused of genocide for an act committed overseas, they MUST be tried in a foreign or international court.

Article VII – by stating that genocide is not a "political" crime – takes away our right to protect American citizens from being extradited to a foreign country to face trial in an international court for acts committed in the United States. Article VII also takes away our right to demand that U.S. citizens and servicemen, who are accused of crimes overseas, be extradited back to America for trial.

Article VIII empowers the UN to interfere in American domestic affairs in order to prevent and suppress any of the vague offenses listed in Articles II and III. The U.N. would decide what is "appropriate" action.

Article IX takes away the U.S. right to decide what the Convention means and how it must be implemented against U.S. citizens. Since any disputes about its interpretation "shall be submitted" to the International Court at the request of "any" of the parties to the dispute, the International Court would decide whether our Congressional legislation is adequate and whether our Supreme Court applies it correctly.

Senator HELMS. Mr. Phillips.

STATEMENT OF HOWARD PHILLIPS, CONSERVATIVE CAUCUS, VIENNA, VA

Mr. PHILLIPS. Thank you very much, Mr. Chairman.

Those who advocate U.S. Senate ratification of the Genocide Convention cannot claim that by such action any act of genocide, such as those committed by the Nazis in Germany, the government of Robert Mugabe in Zimbabwe against its tribal rivals, or the Soviets in Afghanistan, by the Communist Cambodians or the Red Chinese will be either prevented or punished.

With no genuine prospect of deterrence or retribution, we are told instead that the reason the Senate should ratify this treaty is to, in effect, make a moral point with world opinion. Mr. Chairman, with great respect to the previous witnesses, let me nonetheless say that over the years America has made many moral points. It has made those points with the sacrifice of millions of lives of American boys. It has made those moral points in the way in which we have made America a haven for refugees from tyranny throughout the world.

In return for these requested gestures, this newly requested gesture, which would be undertaken to establish our worthiness in the eyes of other nations, few, if any, of which guarantee their citizens the liberties and privileges which are the birthright of every American, the Senate would place at risk our 200-year history of jurisprudence and constitutional rights, thereby at least potentially making the protections of American citizenship subject to the whims of the United Nations and its adjunct institutions, entities which have become increasingly hostile to American values and American interests.

Would any Member of the Senate prefer to be subject to Byelorussian justice, Ugandan justice, Iranian justice, Vietnamese justice, or even British justice, rather than American justice? If the answer is no, how then can they vote to place their constituents so at risk?

Would any Senator wish to place himself at the mercy of the U.N. General Assembly, where the votes of the Soviet puppet regimes in Bulgaria, East Germany, or even Communist-dominated Afghanistan would carry the same weight and power and would indeed cancel out the vote of the 240 million people of the United States of America?

Article VI of the Genocide Convention says: "Persons charged with genocide or any of the other acts enumerated in article III should be tried by a competent tribunal of the state in the territory in which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which have accepted its jurisdiction."

Our Government could eventually be required under the terms of the Genocide Convention to extradite U.S. citizens charged with genocide to the jurisdiction of some foreign court, without reference to the procedural and substantive safeguards of the American legal system, including the right against self-incrimination, protection against unreasonable searches and seizures, the writ of habeas

corpus, and the right not to be denied life or liberty without due process of law.

Control over interpretation of the Genocide Convention and its application for individual U.S. citizens would be surrendered to the so-called International Court of Justice, a politically comprised body whose members, however worthy, represent systems and legal traditions which reject the very premise of American liberty, namely that we are endowed by our creator, rather than by our temporary rulers, with certain inalienable rights.

There is absolutely no sound argument for making American citizens subject in any way to the World Court, the United Nations, or to any other international body heavily influenced and sometimes dominated by personnel from Communist dictatorships. As Richard Nixon, then a Senator, observed in 1951:

> The major objection to the treaty is that its provisions would not apply to the persecution of political minorities of the Soviet Union. In addition, the treaty in its present form grants far more power to the international organization than the United States should agree to.

The treaty stipulates that genocide includes causing mental harm to members of a national, ethnical, racial, or religious group. Theoretically, FBI agents and police could have been turned over to the World Court some years ago for their alleged harassment of the Black Panthers. We might even see the day, Senator, where, with the help of federally funded Legal Services lawyers, immigrants to the United States could bring U.S. citizens before the World Court for a violation of their perceived rights under the U.N. Charter.

Numerous other examples can be imagined. During the Vietnam war, American soldiers were accused of genocide by the Soviet-backed Viet Cong. If the treaty had been ratified then, American prisoners of war could have been tried, with full U.N. support, at the whim of our enemies.

The convention, which sweepingly includes complicity in genocide and conspiracy to commit genocide, applies to persons charged with genocide, whether they are public officials or private citizens. Will the day come when conservative Senators are hauled before the World Court for failing to support increased welfare benefits for minority group members? Or will liberal Senators who support abortion be tried and prosecuted for their votes in facilitating the murder of millions of unborn children, substantial portions of whom are non-Caucasian?

What may seem unlikely in one era can be highly likely 30 years, 20 years, or even a single decade later. We cannot foresee the future. We do not know whether the machinery of the United Nations and the World Court will be dominated by a Muamar Qadafi of Libya or an Ayatollah Khomeini of Iran or a Fidel Castro of Cuba. Nor would we have more than our one vote in the General Assembly to protect us against the consequences of such possibilities.

America's system of checks and balances, separation of powers and federalism have made us the freest people in the history of the world. Why place these at risk? Were the United States, Senator, to jeopardize that liberty for a mess of short-term public relations

pottage, such a decision would be unworthy of the highest traditions of this great body.

As columnist George Will observed this past September in the pages of the Washington Post: "How, you ask, can anyone oppose a treaty opposing genocide? Easily, if you start by reading it."

Thank you, Mr. Chairman.

Senator HELMS. Thank you, Mr. Phillips.

Well, I have been here all day, or most of it, and two or three times I have wondered whether I was participating in the consideration of a constitutional document or a public relations project, and I say this with all due respect to the Senators and witnesses who disagree with me about the importance of knowing what we are doing.

Now, time is fleeting, and those of us who are in the Senate and in the White House today will not be here and there a few years from now, and if we do not put it down as we mean it to be now, then I think we run a great hazard.

I appreciate the testimony of both of you. I have a few questions. First, Mrs. Schlafly, you are a lawyer, one whom I respect. In your analysis, how does the Genocide Treaty impact on such fundamental constitutional guarantees as due process, as trial by jury, and things of that sort?

Mrs. SCHLAFLY. I think the big issue is, could Americans be called up before some international penal tribunal where, of course, we would not have any of those guarantees. I noticed in the hearing this morning the witnesses for the treaty said, do not worry, there is no such penal tribunal. Then you asked about setting one up.

The State Department lawyer said it could not be set up unless we signed another treaty. The Justice Department lawyer said, that was not exactly right, that it could be done by executive agreement. Then you asked them, whatever opinion you are giving, could that not be different under a new administration? And I think they tacitly agreed to that.

Now, I do not think that is a very good safeguard of the constitutional liberty that all Americans have under the Bill of Rights. I do not think any cause is worth risking the great constitutional liberties that we enjoy under the Bill of Rights. No other country in the world would give us those rights, certainly no international tribunal.

Senator HELMS. Well, there is an old poker expression: If you are holding cards you do not like, you bet on the outcome. That may be all right for poker, but it is not all right when you are considering a treaty.

Mrs. Schlafly, it appears to me that the proponents of the Genocide Convention for public relations purposes would weaken or give up our national sovereignty. They say not, but I cannot read it any other way. Maybe I am wrong. I want to know, how do you view this potential cession of our sovereignty for the sake of supposedly scoring points at some international conference?

Mrs. SCHLAFLY. I listened to all the testimony in favor of the treaty, and it seems to me that the only argument they gave for ratifying the treaty is that they are embarrassed when they go to these international forums and hear unkind things said about our

country by other countries. That does not sound like a very good argument for risking our national sovereignty and constitutional liberties of our citizens.

It seems to me that we ought to have a better argument than that for ratifying the treaty. The United States made a great statement against genocide when we committed all of our resources in terms of men and money to winning World War II and wiping out the No. 1 perpetrator of genocide.

Anybody who is embarrassed about U.S. actions in the international arena, I think, has not read history the way it really is. The United States has nothing to apologize for.

Senator HELMS. I just do not know of any provision in the Constitution enabling the Congress to ratify a treaty for public relations purposes. I come back to that, because all I have heard today is that people might not like it, so they may criticize us, but they are going to criticize us anyhow. That is the name of the game between government and their representatives who are not free and do not believe in freedom and our own country which is free and does believe in freedom.

Mrs. SCHLAFLY. That is why, Mr. Chairman, in my testimony I addressed this argument that the treaty does not really mean anything, that it is just symbolism. I think we would find that all of the symbolism is going to go against us, because it opens us and our friends, such as Israel, up to unjust charges.

Senator HELMS. Well, you raise a point that has intrigued me. First of all, I have been pretty faithful in attending all of the informal meetings with foreign dignitaries who have come to Washington. Under the rules of this committee, none of them can testify formally before the committee, but we do meet informally in room S-116 of the Capitol.

And you know something, Mrs. Schlafly, I have never heard one of them mention the Genocide Treaty, not once. As a matter of fact, when I was present at any of the meetings with any of these foreign diplomats or heads of state or whatever, no Senator has raised a question.

Neither have any of the visiting dignitaries, so I think that is significant in terms of the declarations here today that, oh, if we do not do this, it is going to be a terrible embarrassment to the United States.

I just do not believe it, and I need to be shown more conclusively than I have been shown thus far. I feel like I am sort of kind of leading the witness, but do you agree with my feeling, aside from the defects that I see in the Convention itself, that by ratifying the Genocide Convention, are we not demeaning the very bedrock of what we call liberty in this country? Do we not open the door to the destruction of guarantees to every citizen that our constitution provides?

The point is this. I go around this country a lot. I attend meetings of all sorts. I watch the faces of audiences everywhere as they put their hands on their hearts and say, "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one nation under God, indivisible, with liberty and justice for all."

And then speaker after speaker arises and talks about the Constitution of the United States being the most unique document ever created by the mind of man, and then we come here, and I hear a frontal assault by a number of people on those who say, wait a minute, we had better be careful.

I know that sometimes I galvanize my own opinion, and I suppose Sam Ervin has done as much to convince me of the imperative nature of being careful about the Genocide Treaty. I asked the president of the ABA, a distinguished gentleman, a fine American, if he shared my respect and admiration for Sam Ervin, and he said, I at least share it.

Well, I wish the ABA would do two things for me—consult Sam Ervin about the Genocide Treaty and then let the House of Delegates vote on it after the fact of the Nicaraguan episode of last year.

Mrs. SCHLAFLY. Well, a great change has come about in the United Nations and in the World Court since the American Bar Association took its position in favor of the Genocide Convention.

I note that none of the lawyers who spoke for the convention addressed the fact that the definition of genocide in the treaty is so bad. If it were submitted to our Supreme Court, it would clearly be held unconstitutionally vague and unenforceable, but by the treaty we would be agreeing to this open-ended definition that would allow American citizens to be hauled and tried under it before some international tribunal.

Senator HELMS. In "Through the Looking Glass" we find written "When I use a word, it means precisely what I intend it to mean, nothing more nor less." And that is the way I feel about this Genocide Convention.

Mr. Phillips, I gather that you believe that ratification of the Genocide Convention would undermine our Constitution?

Mr. PHILLIPS. Mr. Chairman, our Constitution is itself written in clear and simple language. It is far more elegant and precise language than that which is used in the Genocide Convention. Despite that fact, judges and legislators have argued for years over the true meaning of the Constitution and its plain words.

Even if there were precise agreement among all of the nations of the world today as to the implications of the Genocide Convention, there is nothing that would prevent that agreement of today from being altered in a very short period of time, however fine the promises may be which are made to the Senate now in the hopes of securing its votes for ratification.

Those promises will be a flimsy guarantee of American liberties in the future. It is really a question of by which law system do we wish to be governed? Do we wish to be governed in accordance with the Judeo-Christian system of American liberty or with the atheistic totalitarian system by which so much of the rest of the world is ruled?

Senator, even if reservations are attached to this convention, in my view it should not be ratified, among other things, because in certain instances at least it would require affirmative action on the part of an executive branch administration to protect American liberties which are now automatically guaranteed under the Constitution.

For example, it is conceivable that a matter of extradition could arise where by the intervention of the President or the State Department an American citizen could be protected from extradition to a hostile nation by which he had been unjustly accused.

But if the administration were indifferent or itself hostile to that individual, as one can imagine might be the case in certain circumstances, then the guarantees of liberty written by the Founders would count for nothing.

Senator HELMS. Well, I gather that you believe that there is no compelling reason for ratification aside from presumably enabling some of our U.S. diplomats to score points at some international conference. I say again that maybe there is a clamor somewhere in the world for U.S. ratification, but I have not heard it. It has not even been mentioned in the scores of visits by foreign dignitaries in which I have participated.

Mr. PHILLIPS. Senator, there are nearly 700,000 supporters of the Conservative Caucus, and while I certainly cannot speak for all of them, my estimate of their sentiment as determined by letters, phone calls, and personal contact is that overwhelmingly, almost without exception, they would be opposed to ratification of this Convention.

I believe that Americans in general when they come to understand the dangers implicit in ratification of the Genocide Convention would share that perspective.

Senator HELMS. Well, I hope that our Jewish citizens will somehow understand that Israel is going to be the first target. Now, let us not kid ourselves. The implementation of the Genocide Convention is awaiting U.S. ratification and then the deviltry will proceed, and Israel is going to be the number one target on all sides. Some of our Jewish friends understand that, and some of them do not.

Mr. PHILLIPS. Senator, I think you should avoid the error of assuming that organized, self-proclaimed spokesmen necessarily speak for large numbers of unorganized citizens, whether they are Jewish or of other faiths.

Senator HELMS. Well, I have not made that error, because I have talked with a number of fine Jewish Americans who understand what this is all about.

Mrs. SCHLAFLY. Senator, at a news conference today we showed about 50 volumes provided by the Library of Congress of false and malicious charges made against Israel in the United Nations. I think that is just a sample of what Israel, as well as Americans, would be subject to under the Genocide Convention.

I would just like to ask you what you think would have been the fate of American servicemen in Vietnam if we had been a party to this Genocide Convention during the recent war there.

Senator HELMS. Well, I think you know the answer to that. The potential was there for wholesale harassment at a minimum and probably worse than that.

Mrs. SCHLAFLY. And doing it under cover of being legal and proper.

Senator HELMS. Exactly. If we get into this, and this is the point I have been trying to make to my fellow Senators, there is no return, because you start this business of abrogating treaties, and you have international implications.

Do either of you have any further comment?

Mr. PHILLIPS. We are grateful for your interest in our views and appreciate the leadership which you and this committee are showing in carefully reviewing this matter.

Senator HELMS. Well, the feeling is mutual. I appreciate your patience, waiting so long today to testify, and I appreciate the work you are doing. Thank you both very much.

The last panel will consist of Ms. Trisha Katson of the Liberty Lobby, and Mrs. Irene L. Shidler of the American Independent Party.

Ms. SHIDLER. It is Iris Shidler. Iris, not Irene, Shidler.

Senator HELMS. Thank you. I stand corrected. Since I mispronounced your name, please go first. I appreciate your coming today, and I appreciate your patience.

STATEMENT OF IRIS L. SHIDLER, STATE CHAIRMAN OF WOMEN, CENTRAL COMMITTEE OF AMERICAN INDEPENDENT PARTY, NATIONAL AFFILIATE, POPULIST PARTY, RIALTO, CA

Ms. SHIDLER. It is an honor to be here, Mr. Chairman.

I am going to approach this from a little different direction. Honorable gentlemen of the Senate and of the Foreign Relations Committee, in my opinion, never forget that you have been elected by the people and for the people of our Republic, entrusted to carry out the will of our fellow Americans, to stand vigilantly protecting the freedoms of the greatest document ever written for people in the history of mankind.

Some of you forgot your patriotism and your purpose when you signed the Declaration of Interdependence at Independence Hall in 1976, relinquishing the sovereignty of the United States to a one-world government. In 1776, at Independence Hall in Philadelphia, where 200 years ago our forefathers valiantly affixed their signatures to our Declaration of Independence, assuring freedom for the citizens of our great country.

In 1976, Henry Kissinger stated, and I quote:

> The day of the United States is past, and today is the day of the Soviet Union. My job as Secretary of State is to negotiate the most acceptable second best position available.

One of our great heroes of the American Revolution, Patrick Henry, asked, "Is life so dear and peace so sweet as to be purchased at the price of chains and slavery?" And then he answered, "Forbid it, Almighty God. I know not what other course others may take, but as for me, give me liberty or give me death."

The peaceniks of this country would rather be red than dead. Unfortunately, our fellow Americans believe that they have a legacy to freedom. Many are unaware that the Constitution is being systematically amended into socialism.

Once again, the honorable Senators of the Foreign Relations Committee are entrusted to carry out the will of the people of our Nation, to protect the freedoms our Constitution and Bill of Rights entitle us to. This time there seems to be a conspiracy afoot by the one-world-dominated news media to keep our people ignorant of the fact that once again the treasonous Genocide Convention is raising its lethal head.

In 1948, the architects of the Genocide Convention designed it to supersede the Constitution of the United States and bring the people of this Nation under the rule of a one-world government dominated by the Communist countries at the United Nations, No. 1.

In 1950, President Truman submitted the Genocide Convention—convention means treaty; they are synonymous—to the Senate for ratification. Public opposition was so strong that the Senate Foreign Relations Committee took no action.

In 1953, after the election of President Eisenhower, there was a renewed effort for Senate ratification, but again the public said no. For 13 years the Convention lay dormant in the Senate Foreign Relations Committee. On May 12, 1966, Arthur J. Goldberg, then U.S. Ambassador to the United Nations, told the American Jewish community that the Johnson administration would press the U.S. Senate for immediate ratification of the Genocide Convention. Public opposition remained strong.

In December 1969, a liberal group within the American Bar Association urged the association to reverse its stand of opposition to the Genocide Convention.

February 1970, President Nixon urged the Senate to ratify the Genocide Convention. Once again, it was not ratified.

For 36 years the patriots of this Nation held opposition to the Genocide Convention, and for 36 years and more one-worlders have been diligently at the task of ratifying the Genocide Convention, even to the extent of keeping it quiet in the media, hoping to pass it unbeknown to our citizens.

I feel convinced that President Reagan is being misinformed and misled by his advisers as to the ramifications of the Genocide Treaty.

Gentlemen, are you willing to spare the President embarrassment at the expense of the people's liberties? If indeed any official who carries the responsibilities of protecting the people's constitutional rights and is a proponent of the Genocide Convention and votes to ratify it knowing full well he was elected by the people and for the people, he should then face the possibilities of impeachment, be tried for treason, and be denied the pension that he has perpetuated for himself, paid by the citizens of the United States of America.

It is apparent to me the very concept of genocide is un-American, unprincipled, and un-Christian, and that genocide, mass killing, is a communistic and immoral device based on the disbelief in the individual as a child of God.

Remember, the Soviet Union has deleted the word "political" from their signing of the Genocide Convention, and are not being brought before the World Court to stand trial for genocide, the mass murders that they have committed against the Afghanistanians and other political purges of genocide on their part and efforts to dominate the world.

America and Americans have every right to opposition to this Convention, and we Americans are not responsible to ratify a treaty for symbolical reasons to the world that denies its citizens, one, freedom of speech. That is article II(b) of the Genocide Convention.

Two, it deprives him of trial by jury, article VI.

Three, it deprives him of trial in the State or district where the alleged crime occurred, article VI.

Four, it deprives him of the right of habeas corpus by not guaranteeing this right in the Genocide Convention.

Five, it permits in the most flagrant manner the extradition of individuals across boundaries, article VII.

Six, it discriminates in favor of certain national, ethnical, racial, or religious groups, article II.

Seven, it provides for no appeal from the decisions of the tribunal trying the accused, according to the U.N. international law, and article II of the Genocide Convention includes the vague and flexible term of "mental harm," which can be dangerously interpreted among the offenses of genocide.

And article IV includes private individuals among those who may be punished, and articles VI and VIII provide for the international tribunals to proceed against individual citizens in accordance with international U.N. law as superimposed upon and above our domestic laws.

Article III, the following facts shall be punishable: A, genocide; B, conspiracy to commit genocide; C, direct and public incitement to commit genocide; D, attempt to commit genocide; E, complicity in genocide, none of which require an overt act of genocide.

It is apparent to me that the Genocide Convention is an instrument, of dictatorship designed by the United Nations for one-world government by which American citizens may be deprived of their constitutionally guaranteed individual freedoms. The above concepts are alien to and destructive of American principles of government. Our Federal and State constitutions prescribe a relationship between government and the people in the United States.

The Genocide Convention is probably the most dangerous of the proponents of one-world government, one, that a nation's treatment of its own people should no longer be that nation's exclusive concern, but a matter of international concern, and two, that individuals should be controlled by a higher political authority than that of our own Nation and Constitution.

In 1788, Patrick Henry said, "Sure am I if treaties are made infringing our liberties, it will be too late to say our constitutional rights are violated."

To the keepers and the protectors of our freedoms, I oppose the Genocide Convention, and find articles I through IX unacceptable. We will not bargain our sovereignty for freedom and peace at any price, and I fear, Your Honor, that if the convention is passed, even with modifications, it will be only a matter of time before the Genocide Convention in its entirety will be added by the political zionists of one-worlders' influence on our future Senators.

I thank you very much for your time. I represent 200,000 people in California from the American Independent Party, and we are also an affiliate of the National Populist Party.

Senator HELMS. Ms. Shidler, I appreciate your testimony, and as I have said to the others, I appreciate your patience.

Ms. Katson, the hour is late. Could I ask you, with the understanding that your full statement will be printed in the record and

made a part of the record and distributed to all of the Senators, may I ask you to summarize?

Ms. KATSON. That is what I was going to do. I would be happy to do so.

Senator HELMS. It will save you and us a little time. I thank you very much. You may proceed.

STATEMENT OF TRISHA KATSON, LEGISLATIVE DIRECTOR, LIBERTY LOBBY, WASHINGTON, DC

Ms. KATSON. Thank you, Senator Helms.

I am summarizing my remarks, and ask permission that my written statement be included in the record as well as a Washington Times interview with Helmut Kimpel, president of the World Service Authority, and the conclusion of James Martin's book, which runs about 15 pages. The book is entitled "The Man Who Invented 'Genocide': The Public Career and Consequences of Raphael Lemkin."

Senator HELMS. I would ask the reporter if you got specifically the 15 pages from the book and the interview in the Washington Times, and her full statement. It will be printed in the record. Without objection, it is so ordered.

Ms. KATSON. Thank you very much.

Senator HELMS. We have to limit you to 15 pages. Obviously, we could not put the whole book in.

Ms. KATSON. Just the conclusion. Thank you very much.

I am proud to represent the 28,000 board of policy members of Liberty Lobby and the 150,000 subscribers to The Spotlight, who are the most patriotic lovers of America and our Constitution that I have ever met. We believe in nationalism, our Constitution, and America first.

We therefore oppose the Genocide Convention, which we believe will undermine our Anglo-American system of law with an international system of law which has a completely different philosophy than the ideas that governed our Founding Fathers and our constitutional republic.

We oppose the convention because of the implications it will have on both a national and international level. The only ones who will gain from its ratification are lawyers specializing in international law who will have a lot more work to do.

Nationally, we are concerned about the possible contents of the domestic legislation that Congress will pass in order to implement the convention. Article VI says people charged with genocide which could be simply causing "mental harm" or even attempting to cause genocide will be tried in a U.S. court if committed here or possibly by the World Court.

We believe this domestic legislation may be modeled after laws in Canada, Britain, West Germany, Sweden, Austria, and perhaps other countries which forbid under their criminal codes certain writings, speech, and actions which those governments have decided cause "public harm" or "racial intolerance."

These laws are cited as examples of national enabling legislation against "genocide" which is increasingly invoked to suppress the

spoken or written criticism of the behavior or beliefs of minorities in that country.

In Canada, publisher Ernst Zundel was charged and convicted under its criminal code with publishing false news. He had questioned the accuracy of the World War II Holocaust claim that 6 million Jews were killed in gas chambers by Hitler's Germany.

Now, I would like to be very clear about this, Senator Helms. As a woman, I have on occasion been subjected to remarks and behavior by individuals who had a stereotypical view or prejudice against women, and I did not like being victimized one bit.

Therefore I am very sensitive to attitudes like this, and try very hard to treat people as individuals. I hold no prejudices against people based on their religion, race, nationality, or sex. But there are political views that I strongly object to.

As a believer in our constitutional republic, I am opposed to any alien political philosophy that would undermine it, be it Marxism, communism, socialism, national socialism or Naziism, or Zionism.

For the purposes of my testimony, it is important that I point out that Zionism is not synonymous with Judaism. Zionism is a political movement while Judaism is a religion. I know Jews who are anti-Zionist. Also I know Zionist Christians.

I am concerned with how pro-Zionist forces have aided in America's having a one-sided foreign policy in the Middle East. I would like to at this point note that every witness that spoke here today and also at Senator Hatch's Subcommittee on the Constitution last week mentioned different horrendous acts of genocide and holocausts that have occurred in the past, and while it was alluded to that Israel might be accused by the Arabs of committing genocide, there has never been a word said on the record that they possibly might be guilty of it.

I would like to take this time to speak on behalf of the Palestinian people who have been victimized by acts of genocide on the part of the Zionist-controlled Government of Israel.

Now, since Zionist forces have played a key role in attempting to get the Genocide Convention ratified from its inception to this day, I am concerned that our Nation may become party to a document that is not in the best interests of America. It is a dangerous thing to tamper with our first amendment guarantees.

Our Founding Fathers devised the first amendment to specifically protect political ideas. If these false news laws had been enacted in America, the ones that are now in place in other countries who are parties to the Genocide Convention, it might not have been discovered that there were no gas chambers on German soil, which even Nazi hunter Simon Wiesenthal now acknowledges after he and others had previously claimed the contrary.

By amending his earlier statements, Simon Wiesenthal had in effect questioned an aspect of the Holocaust, but representatives of the Canadian Jewish Congress and the Canadian Civil Liberties League say that anyone who questions the facts of the Holocaust has evil ideas that must be prosecuted in criminal court. That sounds like George Orwell's thought police to me.

Once a government starts forbidding certain writings or speech, as long as they do not incite others to commit crimes, then our first amendment guarantees become a mockery. I have heard examples

of what would constitute punishable acts under the mental harm provision, and they all relate to war crimes of World War II.

I would like to see a list of books, materials, actions occurring now in the United States that advocates of the convention feel should be punishable under the Genocide Convention. Can Senator Boschwitz or Senator Pell, for instance, give me a list of activities going on now that they feel are dangerous enough to constitute genocide under the convention?

It is a fundamental concept of our law that a criminal statute must be defined clearly enough so people know what to avoid doing if they so choose. Raphael Lemkin, who invented the word "genocide," and his followers always intended that individuals be extradited under the Genocide Convention.

He dreamed of an international arena for consideration of these cases. It has always been the intention of the convention promotion to extradite people all along. It is no secret.

Helmut Kimpel, president of the World Service Authority, says plans are now taking place to set up an international law making, law enforcing, and law controlling machinery which could be used to enforce the Genocide Convention.

Kimpel is working toward adoption of the universal declaration of human rights petition by the District of Columbia this year. This petition was adopted by the United Nations in 1948, the day after the adoption of the Genocide Convention. If the petition is approved by the District's Election Board, placed on the November 1985 ballot, and passed, it would constitute a mandate by District voters to the U.S. Government to effect a constitutional amendment for that purpose. This would take on a global importance in many nations.

The petition will be binding law where people will have a legal basis to demand directly elected representatives the same way we elect local officials, State legislators, and Congressmen. He envisions a world parliament that could enact such laws and set up the administrative governmental machinery to execute these laws and the judicial body to control them.

The blending of these two concepts, a human rights petition playing a role in the construction of international machinery to enforce bringing those who commit genocide to justice, makes perfect sense from a historical point of view. Lemkin brought these two concepts together in his lectures.

Those who have claimed that the World Court would never order the United States to do anything contrary to its national security interests have been proven wrong in the recent case of *Nicaragua* v. *the United States*, where the Court has asserted the right to order the United States to cease its involvement in an armed conflict and pay hundreds of millions of dollars in reparations to Nicaragua.

If such an order is issued and obeyed, it would set an enforcement precedent for the World Court.

As to the legal and constitutional implications of the Genocide Convention, I urge that every member of this committee and every Member of the Senate study the testimony presented by Prof. Robert Friedlander before this committee and before Senator Hatch's Constitution Subcommittee.

He has researched the intent of our Founding Fathers and found that they never wanted treaties to dictate domestic legislation, and that our Constitution only provides for treaties, not conventions.

I spoke last week with former Senator Sam Ervin, who fought against the Genocide Convention, as you know, Senator Helms, for many years while he was in the Senate. He told me that although he regretted not being able to be here to testify, that he wanted the members of this committee to know that he is still fervently opposed to the Genocide Convention, and he asked me to request that his Congressional Record statement of May 25, 1970, be inserted into the hearing record.

Thank you.

Senator HELMS. Without objection, it will be inserted in the record.

Ms. KATSON. Senator Ervin said that he thought that President Reagan had announced his support of the Genocide Convention because he really did not understand it, and that he only gave his endorsement to appease Jewish groups.

Every time a liberty is taken from us, it is done in the name of some noble purpose. Property rights have been taken in the name of human rights. Domestic legislation may be passed in the name of preventing public harm or racial intolerance.

The Genocide Convention has noble, humanitarian-sounding purposes, but it conceals the aims of those supporting it to use the issue of genocide to convince Americans to submit themselves to the jurisdiction of a World Court. And we have also submitted ourselves to the World Court in about 80 other treaties, and how many Americans do not even realize that? We do not even know what is in those treaties.

We believe that the internationalist forces working together fully intend to set up this machinery to institute real international law to enable the World Court to enforce its rulings, and it might be invoked against the very Senators who pass it, because there are millions of Americans who could list a myriad of offenses committed by many legislators that have caused them great mental harm. You are excluded from that, Senator Helms.

If the Genocide Convention is ratified, we quite frankly view any Senators who vote for the convention, Senators who are sworn to obey their oath to uphold the U.S. Constitution, as being guilty of sedition. We urge the members of this committee and all other Senators to vote against ratification of the Genocide Convention.

I thank you for the opportunity to testify.

[Ms. Katson's prepared statement and attachments follow:]

PREPARED STATEMENT OF TRISHA KATSON

Thank you for giving me the opportunity to testify today on behalf of the 28,000 board of policy members of Liberty Lobby, a nationalist, populist institution that stands for America-first, as well as the 150,000 subscribers of the Spotlight. I am proud to represent these individuals, who are the most patriotic, dedicated lovers of freedom and our Constitution that I have ever met.

We oppose the Genocide Convention (GC) which will undermine our Anglo-American system of law with an internationalistic system of law possessing a completely different philosophy than the ideas governing our founding fathers and guiding our constitutional republic.

We oppose the GC on two fronts: on a national level as we view domestic legislation to be enacted by Congress to implement the GC will violate our constitutional rights; and on an international level, for subjecting U.S. citizens, without guarantee of constitutional rights, to extradition and trial before a World Court.

The description in Article II(b) of genocide as causing "mental harm" to a group jeopardizes our First Amendment guarantees of freedom of speech, press, assembly, and the right to petition government for redress of grievances. The American Bar Association's (ABA) attached "understanding" says this means "permanent impairment of mental faculties."

However, not only is there no guarantee that contracting parties would adhere to this clarification, but it probably means nothing more than a statement of what the Senate "understands" mental harm to be. Two legal scholars who testified before Sen. Orrin Hatch's Senate Judiciary Subcommittee on the Constitution, Robert Friedlander, professor of law, Ohio Northern University, and Rodolph J.A. de Seife, professor of law, Northern Illinois University,

on February 26 said that both understandings and declarations carry absolutely no legal weight, are meaningless, and that only reservations can be used to renegotiate the GC.

John Murphy, professor of law, Villanova University, argues that the "drafting history" of the GC says that "mental harm" means "physical injury to the brain, particularly through the forced use of mind-altering drugs." But the usage of those words in the GC's drafting history is no assurance that they will bind any rulings before domestic courts or before a World Court for that matter. If this logic is used, then it is also possible that the drafting history's language prohibiting all forms of public propaganda encouraging genocide could also resurface, which raises even more serious questions of First Amendment violations.

Also, Article VIII allows the United Nations, on suggestion by a contracting party, to take whatever action it deems necessary to prevent the causing of "mental harm." And Article IX lets the World Court decide any matters of confusion relating to the interpretation of the GC.

We are concerned about the nature of the domestic legislation that Congress must pass to implement the GC. Article V mandates Congress to pass the "necessary legislation" to set the GC in motion, including the imposition of penalties. Currently in Canada, Britain, and West Germany, and perhaps other countries, laws have been enacted under criminal code prohibiting certain actions, writings, and speech deemed by the state to cause "public harm" or create "racial intolerance." Could these types of laws, which we believe to be an abridgement of First Amendment rights, be a model for what is to become future law in the U.S.?

James J. Martin notes in his book about the man who invented the genocidal concept and actual word "genocide," entitled, The Man Who Invented 'Genocide':

The Public Career And Consequences of Raphael Lemkin:

> "The contemporary feebleness of the 'genocide' impulse as a worldwide concern has sparked as compensation its utilization in domestic politics, but resting on the peculiar nature of minority relations and power structures, which vary from country to country. This is reflected in enabling legislation which follows parliamentary ratification by this or that country of the Genocide Convention. The definition of 'genocide' in the latter is so sweeping that it encourages a strategically-placed minority to lobby for passage of a law or laws that may render themselves virtually immune even from superficial criticism, on the grounds of constituting 'mental harm' to them as incorporated in the Convention's Article II. Great Britain's Race Relations Acts are sometimes cited as examples of zealous national enabling legislation respecting 'genocide' which is increasingly invoked to suppress spoken or written criticism of the behavior or beliefs of minorities in that country.
>
> "This has been one of the few demonstrably successful operational tactics inspired by the 'genocide' concept, a degeneration of its announced noble international goal into a questionable local political ploy. Structured in this way to redound to the comfort and welfare of minorities in that state, it still imposes a difficulty upon minorities employing this device to render themselves immune to public criticism, however. The pushing of such positions by law may provoke a constitutional question relating to free speech and related civil liberties, which, like the right to think, apply to majorities too."

Examples usually given to explain actions that would be punishable under the GC's "mental harm" provision are "war crimes" that occurred 40 years ago during World War II. Focusing on events of the past, however tragic, detract from the realities of today. I'd like to see the ABA and those senators who favor the GC provide a list of activities happening now in the U.S. that they would construe as falling under the "mental harm" provision of the GC.

In the ABA Journal (August 1949), Chief Judge Orie L. Phillips noted that a fundamental concept of our law is that a legislative body must define a crime with reasonable precision so as to inform persons subject thereto what it intends to prohibit so they may have a certain and understandable rule of conduct and know what it is their duty to avoid.

As these domestic activities would fall under the GC's implementing

legislation, and since Article VI says individuals can be charged by a competent tribunal of the state in the territory of which the act was committed, the enforcement mechanisms to enforce the prosecution of these activities would take effect as soon as the legislation was passed. There is no need to wait for the World Court to obtain enforcement power on an international level as Article VI works on a national level as well.

The Toronto trial of Canadian publisher Ernst Zundel, president of Samisdat Publishers, which began January 7 is a case in point. Zundel was charged with printing booklets, one questioning the accuracy of the World War II Holocaust claim that six million Jews were gassed by Hitler's Germany, the other claiming a worldwide conspiracy involving international bankers, communists and freemasonry. The judge refused to take judicial notice of the case and dismiss it on the grounds that the information Zundel printed was contrary to "established historical fact."

During the course of the trial, according to the Toronto Sun (January 18, 1985), "Holocaust expert Dr. Raul Hilberg conceded no scientific study has ever been done to prove the existence of Nazi gas chambers." The newspaper further noted that "Hilberg also said an American judge's report that 137 Germans had been kicked in the testicles 'beyond repair' to extract confessions of killing Jews may be true."

Would the materials published by Zundel be a punishable offense under the GC? And would the remarks by Hilberg, questioning the Holocaust, constitute speech that would cause "mental harm" and therefore also be punishable?

Would scientific studies and works by anthropologists studying the differences between racial and ethnic groups, such as that done by William Shockley or by Wilmot Robertson in his book The Dispossessed Majority be construed as causing "mental harm" under the GC?

Would statements by Jewish groups staking a biblical claim to Israel be

guilty of causing "mental harm" to American Arabs who claim Palestine as their rightful home?

Would demographic studies, such as the one co-authored by Leon Bouvier, which predicts that whites will be a minority race in the U.S. within the next century, to be overtaken by a Hispanic/black/Asian majority be deemed to cause "mental harm" to whites?

Would the Spotlight newspaper, formerly published by Liberty Lobby, which features articles critical of political Zionism, and is thus charged with being anti-Semitic, be considered a publication causing "mental harm"?

These are just a few examples of the problems that can arise in the area of First Amendment guarantees under the GC. Who will decide what books, or words, or actions will be banned? And taken to an international level, should we give this authority to a world court?

Treaty proponents who claim the GC is merely a symbolic gesture to demonstrate our abhorrence to the killing of human beings have strayed far from the intention of Raphael Lemkin and his followers. He wanted to extradite individuals for crimes of "genocide" and dreamed of an international arena for consideration of these cases. On December 9, 1948, the UN General Assembly adopted a resolution requesting that the International Law Commission study the possibility of creating an international penal tribunal or possibly a "criminal chamber" bolted to the International Court of Justice still sitting at the Hague, which would hear "genocide" cases.

Taking into consideration the many events that have taken place in this century alone that has led our nation away from constitutional government and toward a so-called "new age" of globalism, it is impossible to believe those pushing the GC do not intend to devise a mechanism enabling the World Court to enforce its decisions.

Indeed, plans are already taking place to make this possible. Global

citizen Helmut Kimpel, president of the World Service Authority and advocate of a universalist concept of law, recently explained plans now taking place to set in motion an "international law-making, law-enforcing and law-controlling machinery" which could be used to enforce the GC.

In an interview with the Washington Times (September 20, 1984), Kimpel said he is working toward adoption of the Universal Declaration of Human Rights Petition by the District of Columbia this year. This petition was adopted by the UN in 1948, the day after adoption of the GC.

If the petition is approved by the District's Election Board, placed on the November 1985 ballot and passed, which Kimpel says would be a "pilot project," in his view it would constitute a mandate by District voters to the U.S. government to effect a constitutional amendment for that purpose. Its an event that he says would take on a "global importance in many nations."

Kimpel says the petition provides a basis to set up machinery to institute real internationcal law: "We must have a law that permits the people in the United States, as well as in all other countries, to set up this international system of law and order." Once adopted, the petition will be "binding law" where "people have a legal basis to demand directly elected representatives the same way we elect local officials, state legislators and congressmen." He envisions a world parliament that could enact such laws and set up the administrative governmental machinery to execute these laws and the judicial body to control them.

This blending of two concepts--a "human rights" petition playing a role in construction of an international machinery to enforce bringing those who commit genocide to justice-- makes perfect sense from a historical point of view. Lemkin brought the two seemingly contradictory concepts together in his lectures: "Genocide deals with the life of peoples--the annihilation

of existence. Human rights is concerned with different levels of existence, while genocide deals with non-existence."

Should such machinery be constructed, who would enforce international law? The UN "peacekeeping forces" is a possibility as is the International Criminal Police Organization (Interpol). Its president, John Simpson, said in an October, 1984 Washington Times interview that he is seeking to establish a leadership role for the United States in international law enforcement. Interpol's main area of concern is fighting terrorism and its group's general assembly passed a resolution that considers some terrorist acts to be legitimate.

"The thrust of the resolution was you just couldn't refuse a request that related to terrorism on the grounds that it was political," he says. "You had to look at the circumstances to make a judgment on each case as to whether or not there was a lawful political feature to it or it was an unlawful terrorist act."

At the League of Nations' Fifth International Conference for Unification of Law in 1933, Lemkin presented to the league's legal council two documents, one proposing the outlawing of "acts of barbarism and vandalism," and the other a study of "terrorism."

Grover Rees III, professor of law at the University of Texas, indicates in the National Review (February 8, 1985), that internationalist senators have been assuring their colleagues as far back as 1946 that the World Court would never order the U.S. to do anything contrary to its national security interests.

These senators have been proven wrong in the recent case of Nicaragua v. United States, where the Court has "asserted the right to order the United States to cease its involvement in an armed conflict--which, virtually by definition, that nation has deemed necessary to protect its most fundamental

interests--and to pay hundreds of millions of dollars in reparations to Nicaragua." If such an order is issued and obeyed, it would set an enforcement precedent for the World Court.

The Nicaragua case was the first time most Americans ever learned that there was a World Court (it was more commonly referred to as the International Court of Justice) through news reports.

These same internationalist senators who claimed the World Court would never act against U.S. interests have also insisted, along with other GC proponents, that we need not worry about any World Court judgments we don't like because the Court has no enforcement mechanism. In our view, anyone who uses this line is either unaware of the internationalist forces taking place to set up such a mechanism and the history of the GC (which is unlikely) or they are trying to mislead people.

As to the legal and constitutional implications of the GC beyond what is indicated previously in this testimony, I strongly urge that every member of this committee study the testimony presented by the aforementioned Professor Friedlander before the Senate Judiciary Subcommittee on the Constitution. It is absolutely imperative that this committee study his legal findings before any vote, as should all other senators prior to any floor vote on the GC.

Since I fully support the constitutional and legal arguments given by Friedlander (Professor de Seife also made some good points), I will just summarize what I consider to be the most crucial legal findings:

Professor de Seife pointed out that the GC is a convention, not a treaty, and that our Constitution does not provide for conventions. The difference, he said, is that treaties are made on a bi-partite (state-to-state) level and conventions involve multilateral and diverse sovereign parties, in this case, of the UN. Treaties are negotiated on a one-to-one basis with another nation while conventions involve a multitude of nations.

He said it is easier to arrive at satisfactory contractual arrangements with one other nation but that the process of multilateral agreement, involving conventions, makes agreement much more difficult to achieve. This is particularly true, he said, where historical background, cultural differences, political and religious beliefs are taken into consideration.

Friedlander explained how many of the legal principles traditionally associated with the supremacy clause and treaty power and legal arguments used by both GC advocates and opponents are drawn from dicta of court cases. Dicta is generalized opinion given by judges which, unlike the actual opinion of the court, is not binding. Dicta at times can state the opposite of the court's opinion.

Friedlander illustrated this best with his reference to Reid v. Covert, a 1957 Supreme Court decision, which GC proponents often cite to support assurances that any treaty provision inconsistent with our Constitution would be invalid under national law. The sweeping statement GC advocates use from the Reid case, "This Court has regularly and uniformly recognized the supremacy of the Constitution over a treaty" was merely dicta, he noted, and only one court precedent (Geofroy v. Riggs, U.S. 354 1, 16-18) was used in the Reid case to achieve this generalization by one of the court justices.

With documented Supreme Court decisions, most notably Asakura v. Seattle (1924), he demonstrated how judges have held the opposite view, that treaties are not limited by the Constitution. Referring to passages from the Federalist papers, the constitutional debates at the 1787 convention, and the state ratifications of the Constitution, he showed how our founding fathers understood the supremacy clause relating to treaties as pertaining only to foreign affairs and not as an alternative means of domestic legislation.

I spoke last week with former Senator Sam Ervin, the well-respected

constitutional scholar who fought against the GC for many years while he was in the Senate. He told me that although he regretted not being able to testify here today, that he wanted the members of this committee to know that he was still fervently opposed to the GC. It's "the most vague and badly worded treaty I've ever read," he said, "and it perverts the true meaning of the word 'genocide,' which is to kill human beings." He said he thought that President Reagan announced his support of the GC because he doesn't really understand it and that he gave his endorsement to appease Jewish groups. Senator Ervin said the ABA understandings and declaration have no legal weight whatsoever and that he had not changed his views on the GC since he left the Senate. He said he wrote a letter to President Reagan regarding the GC and that all he got back was a notification that the letter was received. There was no personal response of any kind from the president. I concur with Senator Ervin's assessment of Reagan's endorsement for the GC and believe that if the president were given the true facts, he would withdraw his support.

The GC has not only not prevented any acts of genocide from taking place in the world, but what we have witnessed since the end of World War II has been a succession of real mass murders occurring in many locations, notes Martin in his book on Lemkin, "as a follow-up to the charges of this happening during that war which presumably inspired the whole idea of 'genocide' to begin with..." Since the Soviets insisted that "political" groups be dropped from GC coverage, and the U.S. agreed, the Soviets and others can murder political dissidents with impunity and still be a contracting party in good standing. It's certainly standing good enough to convince GC proponents that we should react to Soviet charges of U.S. genocide with guilt and that we should ratify the GC to quiet this criticism.

In this century, there has been a concerted effort by those internationalists

who are working to destroy our sovereignty and our concept of nationalism and replace it with their globalist ideas. The erosions of our constitutional form of government, most notably passage of the 16th Amendment, used as justification for the Marxist idea of a graduated income tax; passage of the 17th Amendment, which provided for the direct election of senators, rather than by state legislatures, which upset the balance of our republic between the federal and state governments; and the passage of the Federal Reserve Act of 1913, permitting issuance of our nation's credit to a private banking cartel, have been parts of this process.

The UN was created to "promote peace in the world" but it now wants to obligate the U.S. to be party to treaties requiring changes in domestic laws and economic programs, thereby usurping our sovereignty. It is commonplace for politicians to call themselves internationalists, resigned to, or happy about, the fact that we live in a "global economy" and we must face the "new realities of an ever-changing world."

We are two states away from the convening of a constitutional convention (ostensibly to pass a balanced budget amendment), the first such event since the convention of 1787. By April, the 33rd and 34th states could send their petitions to Congress. A myriad of internationalist groups, including the Committee on the Constitutional System, funded in part by David Rockefeller, and the Jefferson Foundation, both promoting parliamentary types of changes to our government, are waiting in the wings should such a convention convene. At least two alternative constitutions, the Newstates Constitution of America and the Constitution of the World, have already been written at great expense.

The average American graduates from high school or college with a poor understanding of what our Constitution is all about. There are a multitude

of internationalist forces who, rather than help teach a new generation of Americans about the nationalist ideas of our founding fathers, would rather promote the concepts of "futurism" and "globalism."

As William Shearer notes in the California Statesman's Foreign Policy Review (January 1985), the U.S. has become a global policeman and that the "foundation for this unprecedented role was laid in World War II and accentuated by our nation's subsequent commitment to permanent internationalism," in 1945, when the U.S. joined the UN.

Two years later the U.S. began ratifying treaties which pledged our nation to defense of numerous foreign nations all over the world. This was a blatant abandonment of our historic principles of non-interventionism and the Monroe Doctrine. These treaties have caused us to now spend about one-half of our defense budget on defending countries around the globe, as well as stationing 523,800 military and naval personnel abroad.

The GC epitomizes the dangerous position our public servants have now placed America in. We would be far better off if we were to begin to disengage ourselves from some of these international entanglements and executive agreements, start concentrating on our own national interests, rather than playing policemen to the world. We can't even control our own borders.

We have a Congress which is strongly influenced by the lobby of a foreign nation, that of Israel. Former congressman Paul Findley from Illinois, who was defeated after 22 years in Congress due to his position of advocating rights for the Palestinian people, says Congress does the bidding of the Israeli lobby, that this lobby has more influence over Congress than does the president, and that presidents fear this lobby.

Findley will soon publish a book of his experiences in this regard, to be entitled, They Dared to Speak Out. He will explain how those members of Congress who express an America-first, rather than an Israel-first, position

on the Middle East, find they have committed "political suicide" and soon find themselves out of office. Just ask former Senator Charles Percy.

Every time a liberty is taken from us, it is done in the name of some noble purpose. Property rights have been forsaken in the name of human rights. The Nuremberg trials, promoted as a device to bring justice to those who had committed crimes against humanity--another noble purpose--nonetheless tried those for a crime which, in the words of former Supreme Court Justice William O. Douglas in his 1954 book, An Almanac of Liberty, "had never been formalized as a crime with the definitiveness required by our legal standards...nor outlawed with a death penalty by the international community." Sen. Robert Taft (R-Ohio) agreed that it was an ex post facto procedure. However, the trials were touted by Zionist and other forces, as a great advance in the establishment of a new international law.

The GC has noble, humanitarian-sounding purposes. But it conceals the aims of those supporting it: to possibly use the issue of "genocide" or international terrorism--both heinous activities--to convince Americans to submit themselves to the jurisdiction of a World Court, a court equipped with a mechanism to bring world terrorists or committers of genocide to "justice."

As we believe that the internationist forces working together fully intend to set up machinery someday to institute real international law with machinery to enable the World Court to enforce its rulings, as part of an eventual "global government," we, quite frankly, view any senators--who are sworn to obey their oath to uphold the United States Constitution--who vote for the GC, and it is ratified, as being guilty of sedition.

We urge the members of this committee, and all other senators, to vote against ratification of the Genocide Convention.

[Excerpt from The Man Who Invented Genocide: The Public Career and Consequences of Raphael Lemkin]

CONCLUSION

TODAY, OVER 40 YEARS after Raphael Lemkin invented the word "genocide," most people who have heard it think they know what it means. The overwhelming majority of them are mistaken; they do not. Few have the faintest idea of the variety of things Lemkin and others gathered in under the cloak of this word. If any impression at all is retained, it is the superficial belief that "genocide" is a synonym for a massacre, and this is dead wrong. Lemkin never constructed a brief against massacre. He was concerned with the disappearance or serious interference with the survival of just *groups* of a racial, ethnic, religious or nationalistic nature. The presumption by many is that he was thinking only of Jews, though his work does not show this, and was adduced to him on the basis of how his work was used in the program against the apprehended German leaders from mid-1945 on, and because the campaign to establish "genocide" as an international crime was so heavily subscribed to by organized Zionism and Jewry in general, though this zeal noticeably abated after Israel became a repeated target for "genocide" charges from the Arab world.

Lemkin's work nowhere displayed the faintest concern for majorities anywhere, regardless of what kind of "group" they may have been, and he never scolded a minority for having at any time in history attempted, or succeeded, in annihilating a majority. So one concluded that he always meant a minority when he used the word "group." In looking past his seminal wartime work in which he developed the entire "genocide" concept, one notices that he is not known to have uttered a word in condemnation of the frightful mass

killings of Germans and anti-Soviet Russians after April, 1945, the expulsions back to Germany's western rump from Poland and Czecho-Slovakia, and the forced "repatriation" of Soviet nationals who had managed to escape westward from the nightmare of Stalin's Soviet Union, 1941-1945. Nor did Lemkin issue any notable unhappy commentary about the tens of millions of Chinese murdered by the Red regime of Mao Tse-tung during the decade he, Lemkin, was laboring so agitatedly for the Genocide Convention in the United Nations. No one ever made a point of his never supporting a single charge of "genocide" made before the UN General Assembly between 1948 and 1959, other than made by Jews, against the Soviet Union from 1950 onward.

From the examples advanced by him as the inspiration for his invention of "genocide," in every case we are made aware of his alleged sentiment in behalf of some tiny minority somewhere. But these condemnations of "genocide" in history are few, sometimes contradictory, and very selective, showing especial unconcern for the modern era and the Western world. Furthermore, most if not all of his examples fail to meet his own stipulation making them "genocide," namely, the requirement of *deliberate, organized, planned oppression or extermination as a matter of public policy.* In structuring "genocide," he reiterated and emphasized that *intent* had to be *proved,* and this is plainly spelled out in Article II of the United Nations Genocide Convention, of which he was the principal author. Therefore, a massacre, no matter how many millions might be involved, did not come under the heading of "genocide" without prior establishment of calculated intentional annihilation, along with the similar planning of a large number of harassments and vexatious interferences with the survival of such groups short of killing them. These are all enumerated in the Genocide Convention, have not been changed, and can be read by anyone in a copy of this document which is available to anyone with the price of a postage stamp, yet is ignored today by most of those who love to turn Lemkin's word over their tongues.

However, one must examine from the start how the whole concept of "genocide" was put together, as has been done in this book. Lemkin's launching pad, his book *Axis Rule in Occupied Europe,* finished late in 1943, published late in 1944, was prepared in a form resembling a legal brief, with historical decorations. Over 60% of this massive tome consists of reproductions in English language translation of more than 330 decrees, orders, promulgations, proclamations and emergency legislation by Germany and its allies, about 80% of them from the years 1940-1941, concerning various aspects of the organization and administration of such

portions of Europe as their armed forces occupied during that time. Somewhere in this 400 pages of print one is supposed to find evidence for the existence of "genocide," as a conscious, planned policy. But, taking up first the most astounding aspect of this complex "crime," if a planned massacre of European Jewry in Axis-occupied Europe, 1941-1945, took place as Communist, Zionist and other spokesmen have alleged and propounded for over forty years, they have no business using Lemkin's book as evidence in support of that assertion, since it does not contain any, and whatever it has to say about the subject of planned mass murder is merely repetition of prior hearsay, all published well before Lemkin's reiteration.

In view of the gravity of the accusation, on which in the final analysis Lemkin's entire charge of "genocide" relied, one should have expected a solid, extended chapter on the matter involving allegations that by sometime early in 1943 the Germans had already murdered, systematically and deliberately as a matter of intentional policy, 2,000,000 Jews in German-occupied Europe. Instead, the heart of his case rested on an obscurely-placed footnote so brief that against the volume of material in his 712-page book, it was palpable only with special assistance, and perhaps involving scientific equipment.

The essence of the legal process, like historical writing, is the presentation in support of the thesis of *evidence*, principally of a *documentary* sort. After that comes *testimony* (even eye-witnesses have their limitations) and *opinion*, and the latter two are of somewhat inferior nature compared to the first-listed, and dramatically and pronouncedly so in the case of history. Lemkin was engaged in an attempt to produce both history and law, but managed to fall far short of the demands of both.

A large part of the indignation expressed by the legatees of Lemkin and the rest of the upholders of the "holocaust" status quo results from the insistence of the skeptics and critics on *some credible documentary evidence*, as a change from the tiresome and dreary emotional and sentimental *testimony* and *opinion* (and the citation of "confessions" extracted from captives not given the opportunity to engage defense counsel to cross-examine the extractors of the "confessions" on which the very heaviest portion of the official holocaust contention is lodged.)

It is increasingly evident also to a new generation uninfluenced by the Stalinist and Zionist politics of the 1945-50 period in particular, that "war crimes" proceedings involving charges of intentional massacres of millions, if conducted under the rules of evidence required in American courts, with defendants allowed procedural opportunity consisting in part of the verification of documentary

evidence and cross-examination of witnesses which are commonplace in even the most prosaic circumstances, let alone in those processes where people are on trial for their lives, would never have lasted long enough to go to a jury, if not dismissed long before that. Eugene Lyons described Nuremberg as an "impious farce," but few if any of the "trials" which have followed it to this day have been any different.

Since the emphasis in Lemkin's *Axis Rule* was upon law, and the entire treatise intended as a prolegomenon contributing to a program involving the making of new international law, the book should be examined and criticized in this light. And on the basis of legal evidence presented by the author for the existence of "genocide" and his discovery of it, the entire thesis fails to hold water. Those who explore his massive tome looking for it will emerge with a barely perceptible catch, even using his standards. The total bag of such which can even by the most tenuous threads be even imagined as "genocidal" is alarmingly minuscule. From the regulations in occupied France which forbid escaped Jews from returning to the German-controlled area, to the decree in Serbia forbidding Jews and gypsies from operating vaudeville houses, cabarets, and carnivals and the like, Lemkin has presented legal support for evidence of "genocide" the strangest and sparsest assortment of legal impositions imaginable. There is a vast difference between having one's property confiscated or one's citizenship revoked, and being put to death arbitrarily.

With the exception of decrees of an emergency nature providing the possibility of a violator being subject to the death penalty, Lemkin nowhere reproduces a law or order of any kind which simply condemns people to die. The primary import of such as he does include under the heading in his book as "genocide legislation" has nothing to do with killing. And his reasoning in respect to some of Axis occupation policy approaches imaginative apprehension rarely seen outside science fiction.

One element of Lemkin's "genocide" obsessions concerned the conviction that the Germans intended to overwhelm various peoples by incredible mass-breeding by German soldiers and the women of occupied regions. Why these hybrid Germans were supposed to appeal to the racial sensitivities of the Hitler regime was never expiained very well. Surely the latter would have preferred 100% ethnic Germans; Lemkin seemed to think they had in mind simply a populace with German fathers. So his pages tremble in places with synthetic horror of the alleged consequences of these biological policies for the Norwegians, Dutch, Poles and others.

In support of such long range intentions, Lemkin, almost in

catatonic shock, cited two emergency orders by the Germans which made the German government partially responsible for the maintenance and material subsidy of mothers of children by German soldiers in two occupied countries. That this was a sensible and practical solution to a social problem which has occurred in wartime for thousands of years was not even remotely considered by Lemkin. He not only designated such a policy as "genocide," but also denounced it as a calculated and deliberate program of "moral debasement" of the women and designed to produce illegitimate children. By default he favored the program of the "Allies," which historically has callously neglected the mothers of their soldiers' children in one land after another, and made to fend for themselves or to depend upon private charitable organizations which may on occasion have stepped in to try to remedy the situation.

It might be advanced just as easily that Lemkin's fear of the breeding capacities of the German armies in occupation and the availability of sufficient local women to make the likelihood of the submergence of the native stock with half-German hybrids seems grossly misconceived and a reversal of the real situation. Given a modest number of such births as he saw guaranteed by the German decrees in Norway and Holland (and the similar order in Poland providing small child subsidies for German ethnics resident there), though he never cited a statistic on this matter, and never was able even to determine if the program had been continued or abandoned, normal demographic expectations related to the activities of occupying troops as noted in previous generations in many other wars suggested that it would be these German hybrids who would be the minority, not the native stock, and that therefore Lemkin should have been expressing concern for *their* survival, and making a general demonstration in behalf of their minority group status. This of course he never even grazed. But Hitler's hopes aside, insofar as Lemkin tried to divine these in this case, he should have had more to substantiate his charge of "genocide" here than the expected behavior of German troops in the future, which is what he was really talking about, not any tangible evidence of any kind.

It is almost entirely of things of this sort that Lemkin's "genocide" case is built, not evidence of legal or other nature providing for the random putting to death of large numbers of people, or even one person. And it would appear that neither Lemkin, nor his battery of diligent assistants and researchers provided by the Carnegie Foundation, nor the resources of the Roosevelt Administration departments and bureaus for which Lemkin worked on the side, in addition to his labors in the Duke University Law School, and all the published sources provided by the Library of Congress, let alone the burgeoning

files of the immense "Allied" espionage and intelligence apparatus, were ever able to come up with anything whatever even faintly of this order, otherwise it would have likely been reproduced in *Axis Rule* in dramatic bold type, and repeated no one knows how many times in succeeding years. In later times a lengthy string of boastful works claiming that the most intimate information about the Germans and their allies was fully possessed by their adversary via cracking their secret codes and infiltrating them with spies of all kinds, but strangely enough, this mountain of information contained not a word of solid worth verifying the incredible story of "genocide" Raphael Lemkin spread out.

A feature of this account was the peppering of his chapters with a repelling narrative of a program of deliberate mass exterminations beginning in 1941, the supporting bolster for such being culled from sources distantly related to what purported to be taking place. Surely something as vast and as gripping as the murder of several millions, in as concentrated a region as was claimed to be the area where it was taking place, would have produced some kind of literature or written record. Since he located a large number of German and other occupation laws, orders and decrees, mainly of an insignificant nature, surely there should have been one such piece of paper verifying the existence of a program putting into effect a mass murder program of such calculated proportions as to have no equal ever before, which might have formed the foundation of his case in this department. But one searches the length and breadth of *Axis Rule* without success here, finding only distant rumors and allegations by second, third or fourth hand commentaries. It does not speak well for the quality of the intelligence services of all the agencies which worked with Lemkin on his historic project.

The more one examines *Axis Rule in Occupied Europe* the more it takes shape, not as a study of the administration of German-controlled Europe between 1939 and 1945 (it contains almost nothing about this subject for the last three years prior to its publication) but as a brief for "Allied" propaganda emphasizing atrocities. Since he did not witness anything he included in his book, Lemkin essentially is passing on the substance of sources hostile to the Germans, much of it inflammatory rhetoric from various conduits of anti-Axis opinion-making, incapable of confirmation then and little of it since, with more than a dollop of ordinary mendacity.

In the matter of claims of deaths attributable to German action, there was no real limit to the imagination of Lemkin's sources, and it was his function to consider all of it as proven. A wartime adversary organization, be it Anglo-American, Soviet, or Zionist, had only to allege an immolation perpetrated by the Germans anywhere in the

war zones to find prompt acceptance as fact by Lemkin. And the chance of being challenged or disproven in the USA or in England, where his book was jointly published, was virtually non-existent. No reviewer quarreled with a line of it, and anyone so brave or so reckless as to have done so in 1944-45 might have been even in danger of his life, given the climate of opinion in the closing months of the war.

The year 1944 was a time when atrocity propaganda exceeded by many magnitudes anything the world had seen, and probably surpassing anything of the kind since, as well. Stalin's armies had captured the first German concentration camp to fall in their hands in July of that year, and sensational accounts grew like bacterial spore colonies in all of the press of the Soviet's "allies" as well as in the USSR itself. The numbers of the dead allegedly exterminated by the Germans as deliberate policy escalated monthly, to be topped many times in the next two years, as the invention of such unverifiable statistical raw material for the propaganda mill became a veritable industry. A parallel atrocity propaganda was taking shape in the Pacific, with the Japanese the accused there, though Lemkin's study never ventured beyond the confines of Europe in the hands of the Axis powers. In view of the high state of emotion prevailing, Lemkin's book had unobstructed clear sailing upon its publication late in November, 1944, even though an almost invisible fraction of one per cent of the English-reading populace ever saw it.

What he had to say in *Axis Rule* reached individuals in a wide circle eventually, but this was the result of a ceaseless promotional and publicity campaign, eventually making him known all over the world. Many things he declared in his book become articles of faith everywhere, and his new word "genocide" ultimately acquired planetary use, and as more than one part of speech. And, thanks to this neologism of Lemkin, a substantial number of policy actions by various national states, particularly in the ten to twenty years after the first appearance of this word, came to be identified as "genocide" by whatever minority which felt itself to be a victim of this or that policy, even if that minority did not even live where the so-called "genocide" had been put into effect.

As has been seen, during the first and very hectic period of efforts to get the "genocide" convention adopted and then ratified universally, the major pressure applied politically in the United States came from organized Zionism, whose spokesmen were hardly all Jews. But the usefulness of the word "genocide" was gradually recognized during this time by ethnic groups which were largely non-Jewish, as well. Accusations before a global audience of "genocidal" policies flowed freely between 1948 and 1958. While Lemkin between

1944 and 1947 *may* have thought that his fellow Jews would be the primary beneficiaries of the establishment of a planetary prohibition of "genocide," it should have become obvious that immense complications lay in store, as his ideas spread throughout the world thanks to United Nations efforts, leading to many unexpected mutations. These in turn suggested evolutionary consequences Lemkin had never considered in first launching the term, especially after his legal contemporaries began to work on the future of it as international law. What lay within their grasp was the construction of a world-reaching protocol which not only might be the permanent protection device for minorities of special kinds everywhere, but a device which might even provide a prescription for something beyond guaranteed survival of minorities: a vehicle which might be employed here or there to be-devil majorities. Some hazy understanding of this began to seep through public consciousness, especially in the USA during the ratification contest. That the "genocide" convention got no farther than it did in America may be attributable to this gradual awareness of where the chefs of "genocide" intended to take their confection in the first place. And for many it brought them face to face with what the components of a social order consist of for the first time.

Ratification of the United Nations Genocide Convention by a sufficient number of states to make it operable worldwide as "international law" was the realization of a minority dream. What went into effect worldwide, through presumably binding only on the ratifiers, came as the result of action by 20 national communities, but amounting to the establishment of the will of a very tiny fraction of the world's population. That its moral weight would far exceed its political authority in terms of conventional representation was to be taken for granted. Now any offended minority had a global platform from which to air its grievance and to loose the most incendiary charges, with a guaranteed listening audience. There is no other comparable example of a minority so small making policy for so many which compares with the maneuvering which ended up in the UN ratification of the Genocide Convention.

Nevertheless, the more one ponders the word "genocide," and contemplates the current definition of it, as embodied in the UN Genocide Convention, the more its essence slips away from comprehension, and gets lost in vague verbiage. As the catchall definition of this synthetic crime was expanded clause by clause, its likely prosecution became less and less possible, let alone probable. As can be seen by a careful examination of Article II of the Genocide Convention, Lemkin and the ingenious men with whom he worked were concerned with far more than just physical extermination of some

people. The new "crime" they created was aimed not only at those who might engage in action intending to reduce the numbers of a minority or to inhibit their growth. It also included acts which might interfere with or obstruct their maintaining their distinctive identity, well-being, and influence, regardless of any reasons for so doing. By the time Raphael Lemkin and his co-workers were through, assembling in their work of genius almost everything they could conceive as might discommode a minority somewhere sometime, they had fabricated an empty verbal balloon, seemingly constructed of something of substance, but actually as illusory a device as the spinners of legal abstractions had ever stitched together in history. Its unworkability was to be demonstrated repeatedly thereafter.

Though there have been many accusations of "genocide" made against a variety of countries in the last 35 years in the United Nations, there has never been a single international indictment, trial or conviction for such a "crime" before that body in all that time, or anywhere else. As an emotional verbal reflex, "genocide" has been sprayed on the world like a garden hose, but tangible responses have been imperceptible. In the eyes of some it never was intended to be anything but noise and smoke, though it took the appearance of a kind of insurance policy against anything happening again such as has long been claimed happened to the Jews of most of Europe during the Second World War. But even repeated claims of "genocide" filed by Jews against the Soviet Union in the last 35 years have been inconsequential, let alone the fate of "genocide" charges made by other and different religious and ethnic groups, which have all failed to get the political or moral support necessary to bring about desired action, or, for that matter, any kind of action at all.

A good case can be advanced to demonstrate that, thanks to the labors of Raphael Lemkin, primarily, the minorities of the world were placed in far worse predicaments, if not more actual danger, than they ever were in before, and that those devoted to a policy of actual extermination of this one or that one were given invaluable assistance in proceeding along such lines. The mass slaughters that took place in the last ten or twelve years of Lemkin's life went unpunished, and even largely unnoticed, even by Lemkin himself, as far as his public statements were concerned.

The sustained failure to include "political" among the category of putative threatened minority "groups" in Article II robbed the Genocide Convention of most of its possible value, and created a loophole by default, from which situation it simply remained for any land interested in eliminating a minority to identify or construe the latter as a *political* adversary of the State. The stupefying and almost unbelievable massacres of Communist China, Cambodia and Vietnam

and those of several parts of Africa, as well as such events as the fierce bloodletting between India and Pakistan, and the overwhelming of Tibet by Red China, all escaped analysis as "genocide" in the final deliberations of the UN, despite the flaming rhetoric to the contrary elsewhere. What we have witnessed since the end of World War II has been a succession of real mass murders taking place in many parts of the world as a follow-up to the charges of this happening during that war which presumably inspired the whole idea of "genocide" to begin with, if we are to believe the language in the very first paragraph of the preliminary material accompanying the UN's own printing of the Genocide Convention.

Can it be said that, after all of Raphael Lemkin's efforts in inventing "genocide," and his decade and a half of ceaseless toil in seeking to get the world to look upon it as the crime of the ages, the safety and security and future of minorities has really been enhanced at all? Superficially this appears to be the case, and the righteous mouthing of the cliches the "genocide" crusade ennobled and engendered goes on every time a particularly repelling outbreak of minority persecution or massacre takes place. But there is also strong evidence that the situation likely to be assumed by protagonists of the original assertion here is anything but favorable.

On the continents of Asia and Africa the facts back up the view that minorities are probably more precariously perched than ever before. Elsewhere there is the sentiment that things are better, and in North America and Western Europe, much better. But Jews continue to complain bitterly about their status in the Arab world and in the Soviet Union, two vast stretches of the world. Other minorities similarly enter their laments concerning their situation in other places, and, overall, one gets the feeling that a wrong turn or two in world affairs might provoke as much trouble for this or that minority as ever happened or was believed to have taken place in the past. In 1979-1980 it was obvious that people with a strain of Chinese blood living in Vietnam were as endangered a minority as has ever graced the face of the planet. In Africa, in a dozen countries, various tribal groups are in grave circumstances, and their predicament promises to stay as bad if not get worse for a long time to come. In the meantime, racial hybrids in many parts of the world, especially in Asia, face incredible if not unsurmountable handicaps.

As already seen, the generous lapses in the wording of the Genocide Convention provide those seeking to impose on minorities with glowing opportunities. The absence of *political* and *economic* group categories from the protected, according to this Convention, is of primary importance in weakening its defensive shield. The opportunity beckons all interested in expunging an unwanted minority from

47-614 O—85——6

the national scene and presence to designate such as *political* opponents, or the *economic* supporters of international enemies via the funding of subversion and treason. They have as a result the perfect excuse to advance whatever means may be construed as necessary to eliminate that minority, and all within the framework of UN legal guidelines; any signatory to the Genocide Convention has by default passed up any reason to object to such a process taking place.

Therefore, the enforcement of the Genocide Convention comes down to a local affair, in one state or another. The creation of international machinery for the processing of "genocide" cases has gone no further than it had at the time the Convention was ratified by the requisite number of UN member states early in 1951. Without a domestic support system for the prosecution of "genocide," in the form not only of enabling legislation implementing the local ratification of the Genocide Convention, but also the will to go ahead with such legal action, on the part of an operationally significant portion of the remaining part of that national populace not belonging to the protesting minority in question, then one may say that for all practical purposes the words in the UN Genocide Convention are nothing. The drive to make the Genocide Convention an international universality turned inward over 25 years ago; those who persist in urging its ratification here or there are thinking of its utility on their own domestic level now, against elements within their own national populace. The coming into existence of an international arena for the consideration of "genocide" cases, as Raphael Lemkin and his supporters dreamed of and talked of for so long, and still considered a possibility in the language of the Genocide Convention itself, appears to be utterly out of the question today.

Raphael Lemkin's principal legacy to the world is not only an ugly neologism which is deteriorating in meaning because of its steadily defective employment (even well-regarded dictionaries prefer their own imaginations instead of consulting the Genocide Convention.) It is also a promise of possible endless contumacy growing out of any possible attempt to make his concept work as operational international law. But as a ritual word, "genocide" may be around a long time, invoked by a succession of wily blatherskites hoping to make a little political hay, or used as a charge and counter-charge by all manner of unconscionable rogues and mountebanks in an effort to defame one another.

The chances of an actual legal event occurring in which a formal indictment is followed by a trial, conviction and punishment on the international level of someone charged with "genocide," let alone an entire *group* of "genocidists," as envisaged by Lemkin (one should keep in mind that as originally conceived by Lemkin, both the

victims *and* the offenders were *groups*), is exceedingly remote, unless there is another war which is brought to a conclusion similar to that ending in 1945. Few able to gain a propaganda or other psychic advantage by bellowing accusations of "genocide" will ever pass up such an opportunity, but, like counterfeit money, the validity of this maneuver is sure to decline steadily, and the invocation of this word some day may have all the weight of a prayer to the idols of pharaonic Egypt.

The more a word is intoned as a political accusation, the more numb and unresponsive becomes public reaction. The most frightful massacres of minorities (whether planned and intentional is not established) decorated the 1960s and 1970s, increasingly responded to by distracted yawns. The more often one heard the loud charge of "genocide," the less there seemed to be done about it on all levels. So what the world seems to be stuck with in this instance is a messy legacy of World War II, and is not the gracious beneficiary of some ageless and towering principle of right which will extend onward for millennia.

"Genocide" long ago served its purpose in providing auxiliary verbal support and dynamism for the procedure leading to the trial and killing of the defeated enemy leaders at the end of World War Two. Since that time its invocation has degenerated to a political swear word, used shamelessly as a device for stirring up emotions and for shoring up political courses of action here or there throughout the world, but it has been largely depleted of whatever substance it ever originally possessed. Though still a redoubtable verbal reflex, one must work hard to see any tangible value in its continuous and mechanical invocation in modern world politics and statecraft.

The goal of all this work by Raphael Lemkin, however, was the creation of international law applying to a new international crime, and obviously he was thinking of a global machine which would deal with it as part of international politics. This is plain to anyone reading Article VI of the Genocide Convention. But in over 30 years there has yet to be a single case of such international punishment, or even an unquestionable and unanimous condemnation even as a declaration of intent. It goes without saying that there is nothing in the shape of a created tribunal, court or judging body empowered to listen to "genocide" charges, and issue pronouncements of innocence or guilt. If such a legal agency, other than those which exist in individual states to take up such matters locally, provided for by enabling legislation passed after ratification of the Genocide Convention, did exist, the problem of enforcing its judgment would be even more formidable than bringing in the indictment. It would require the substance of warmaking potential to make its will heard and

obeyed, as it is nearly unthinkable that a sovereign state would submit tamely to an international juridical invasion of its borders by the agents of foreigners to spirit off to jail or execution its citizens in the name of an agency alien to it, resulting from a charge stemming from the movement of legal machinery in some distant place.

However, Article VI begins, "Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed," and this is what "genocide," in view of its dismal record as an international matter, has descended to. It is also the reason for the continued agitation in one country or another for that nation's ratification of the UN Genocide Convention. The contemporary feebleness of the "genocide" impulse as a worldwide concern has sparked as compensation its utilization in domestic politics, but resting on the peculiar nature of minority relations and power structures, which vary from country to country. This is reflected in the enabling legislation which follows parliamentary ratification by this or that country of the Genocide Convention. The definition of "genocide" in the latter is so sweeping that it encourages a strategically-placed minority to lobby for passage of a law or laws that may render themselves virtually immune even from superficial criticism, on the grounds of constituting "mental harm" to them as incorporated in the Convention's Article II. Great Britain's Race Relations Acts are sometimes cited as examples of zealous national enabling legislation respecting "genocide" which is increasingly invoked to suppress spoken or written criticism of the behavior or beliefs of minorities in that country. This has been one of the few demonstrably successful operational tactics inspired by the "genocide" concept, a degeneration of its announced noble international goal into a questionable local political ploy. Structured in this way to redound to the comfort and welfare of minorities in that state, it still imposes a difficulty upon minorities employing this device to render themselves immune to public criticism, however. The pushing of such positions by law may provoke a constitutional question relating to free speech and related civil liberties, which, like the right to think, apply to majorities too. And too zealous enforcement can result in a socio-political situation with somewhat more grim and unwanted complications. It then depends upon the political wisdom of the minorities involved, and how far they are willing to employ minority parliamentary strength to ensure what may be an entirely illusory security. Any minority or any other "racial, ethnic, national or religious group" living in any national state on the planet which think they are safe to do what they please, always relying on the ultimate shelter of the umbrella of the Genocide Convention, are

undoubtedly engaging in the same kind of illusion those who make use of fifty-year-old bomb shelters are indulging in, in a world about to mass-employ laser and particle beam weapons. The paper and words of the United Nations Genocide Convention are no more likely to provide the freedom from pressure that minority groups have been led to rest their faith in since Raphael Lemkin, than classical civilizations were able to muster protection from their adversaries by way of reciting the incantations of the priests of Baal.

Between 1943 and 1951, Lemkin and his co-workers in the United Nations provided minorities everywhere with a strategem, in the shape of the Genocide Convention, which invited the overplaying of their hand in a grave manner. In the decade roughly comprising the years 1963-1973 the world was treated to an explosion of reckless, violent hooliganism with lethal complications, instigated and carried out by minorities in several countries, notably in the United States and France. The assumption seemed to be that a new era had arrived in which minorities might engaged in whatever behavior they might choose, without fear of a reaction or reprisal, the notion apparently having got at large that psychologically and morally, majorities had been so cowed by the previous decade of minority pressure that there no longer was any need to have this in mind.

However, this same decade and that which followed were also featured by frightful reactions against minorities in several different countries on three continents. The minorities of the former cut which rejoiced in the hysteric delusions accompanying a victorious laying waste of the majority world about them, and which descended from others who were stentorian in denunciation of atrocities of this sort which they claimed to have sustained in the 1940s, were virtually inaudible this time around, the victims being someone other than themselves. But the lesson involved in this incredible interlude in the USA, in particular, was not lost on all. America's famous longshoreman philosopher, the late Eric Hoffer, appalled and deeply disturbed by the events in the USA, was convinced that the "violent minorities" were heading straight for a hecatomb if they did not modify their behavior sharply, and soon. In his book *First Things, Last Things* (Harper and Row, 1971), Hoffer was convinced that "a day of wrath" was "waiting around the corner," when he expected that "the saturated resentment of the long-suffering majority" would "crystallize in retaliation."

This never happened, of course. Hoffer miscalculated the capacity of the American majority for absorbing outrage. But the potential was there and Hoffer correctly sensed it, even if his time table was off. Perhaps this entire minority gout of pointless destruction, accompanied fortunately by a minimum of lethal consequences,

had a deep philosophical tie-in with the immense impulse toward pro-minority protectiveness inherent in the accompanying sentiments played upon by organized minority politics, while the "genocide" subject washed across the world in the '40s and early '50s.

But the game was up now. Having served its immediate political purpose in the closing years of World War Two and those immediately afterward, it may be that, other than advancing minority advantages in one country or another, the "genocide" impulse had peaked, and now was on its way to becoming a verbal totem, a flimsy piece of paper incapable of protecting any minority anywhere, other than in those regions where cultural and civilizational levels were sufficiently elevated to preclude the intentional annihilation of minorities, not because some members of the United Nations had declared this to be a crime, but because it was something the psychically-human simply did not do.

In the trade-off, minorities of all kinds in such favored circumstances have to come to terms with the constant temptation to succumb to the beckonings of megalomania and temper their dreams of exclusive privileged status and/or overlordship, or run the risk of eventual reaction, as has been seen over the millennia, but which, in the modern world, and in the likely future, given the state of the art in the contrivances of violence, "genocide" or no "genocide," promises to make the inconveniences or the disasters suffered by minorities in the past little more than superficial irritations, by comparison.

[From the Congressional Record, May 25, 1970]

THE GENOCIDE CONVENTION—WHY THE SENATE SHOULD REFUSE TO RATIFY IT

Mr. ERVIN. Mr. President, it would be extremely unwise for the Senate of the United States to ratify the Genocide Convention. This is particularly true at a time when it is manifest that a substantial part of the American people wish to contract rather than expand their international obligations.

HISTORY OF THE GENOCIDE CONVENTION

During the 1940's activists connected with the United Nations engaged in a strenuous effort to establish by treaties laws to supersede domestic laws of nations throughout the earth. The Genocide Convention represents one of these efforts. It originated in a resolution of the United Nations condemning genocide as a crime whether "committed on religious, racial, political, or any other grounds." When reduced to its final form it excluded genocide committed on "political" grounds because some of the parties to it did not wish to surrender even nominally their right to exterminate political groups hostile to their rulers. Under its provisions, individuals as well as persons exercising governmental power would be subject to trial and punishment for offenses which have always been regarded as matters falling within the domestic jurisdiction of the various nations.

The Genocide Convention was adopted by the General Assembly of the United Nations on December 10, 1948, and was submitted by President Harry S. Truman to the Senate for its consideration on June 16, 1949. The Senate Foreign Relations Committee appointed a subcommittee composed of very able Senators, who conducted hearings in January and February 1950, and reported to the full committee that the United States should not ratify the convention in any event unless the Senate adopted four substantial understandings and one substantial declaration. Since this report was made, the Senate Foreign Relations Committee and the Senate itself by inaction have refused to ratify this convention.

In contrast to the attitude represented by this inaction during the preceding 20 years, the Senate Foreign Relations Committee has apparently revived the question of ratification during the past few months, notwithstanding the fact that there has been no change of circumstances which would make what was unwise in 1950 wise in 1970.

The only argument now advanced for ratification of this convention is that it would improve the image of the United States in the eyes of Russia and other totalitarian parties to the convention, which strange to say have repudiated by understanding and reservations many of the provisions of the convention.

For example, these nations refuse to be bound by article IX which subjects their actions under it to the jurisdiction of the International Court of Justice. Some of the proponents of ratification by the Senate advance the rather strange argument that the United States can safely ratify the convention because there is no effective way to enforce its provisions against the United States if the United States refuses to abide by them. I cannot buy this argument because I think that any nation which makes a contract in the form of a treaty should accept its obligations even in the event such obligations prove to be contrary to its own interest. Otherwise, why make treaties.

Before discussing the obligations which the United States would assume as the result of Senate ratification of the Genocide Convention, I wish to call attention to its salient provisions.

PROVISIONS OF THE GENOCIDE CONVENTION

By the Genocide Convention or treaty the contracting parties affirm in article I "that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Articles II and III of the convention read:

"*Article II*

"In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

"(a) Killing members of the group;

"(b) Causing serious bodily or mental harm to members of the group;

"(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

"(d) Imposing measures intended to prevent births within the group;

"(e) Forcibly transferring children of the group to another group.

"*Article III*

"The following acts shall be punishable:

"(a) Genocide;

"(b) Conspiracy to commit genocide;

"(c) Direct and public incitement to commit genocide;

"(d) Attempt to commit genocide;

"(e) Complicity in genocide."

Article IV specifies that "persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the convention and to provide effective penalties "for persons guilty of genocide or of any of the other acts enumerated in article III."

Article VI provides that "persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the nation in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

Article VII provides that the parties to the treaty pledge themselves in genocide cases to grant extradition in accordance with their laws and treaties. Article VIII provides that "any contracting party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III."

Article IX provides that "disputes between the Contracting Parties relating to the interpretation, application, or fulfillment of the present Convention—shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

This brings me to the considerations which ought to deter the Senate from ratifying the Genocide Convention. Time and space compel me to limit my statement to only the most substantial of them.

CONVENTION DISTORTS CONCEPT OF GENOCIDE

First, if the Senate should ratify the Genocide Convention, the United States would be obligated by it to prosecute and punish public officials and private citizens of our country for acts alien to the concept embodied in the term genocide.

The definition of genocide appears in article II which states that the term genocide embraces five specified acts "committed with intent to destroy, in whole or in part, a national ethnical, racial or religious group, as such." The convention definition of genocide is inconsistent with the real meaning of the term, which is "the systematic, planned annihilation of a racial, political, or cultural group." The word annihilation clearly contemplates the complete destruction or the complete wiping out of the designated group.

Yet, the convention definition covers the destruction either in whole or in part of members of a group embraced by it. This means that a public official or a private individual is to be subject to prosecution and punishment for genocide if he intentionally destroys a single member of one of the specified groups.

When it considered this convention in 1950, the subcommittee of the Committee on Foreign Relations took note of the fact that the convention distorts and perverts the entire concept embraced in the word "genocide," and for that reason stated that the Senate ought not to consider ratification of the convention unless it announced this understanding of its meaning:

"That the United States Government understands and construes the crime of genocide, which is undertakes to punish in accordance with this convention, to mean the commission of any of the acts enumerated in article II of the convention,

with the intent to destroy an entire national, ethical, racial, or religious group within the territory of the United States, in such manner as to effect a substantial portion of the group concerned.

This distortion and perversion of the plain concept embraced in the word "genocide" represents an effort on the part of the drafters of the convention to make punishable either in the courts of an adherent to the treaty or in an international tribunal to be established under the terms of the treaty, all of the acts enumerated in articles II and III of the convention.

Since an intent to destroy a single person belonging to one of the four designated groups would subject an official or individual to punishment, the treaty would make virtually every person in any nation adhering to it a potential victim of genocide as the meaning of that term is distorted and perverted by the convention. This is true simply because virtually every person on earth belongs to one or more of the four groups designated.

This observation is made exceedingly plain by the fact that an ethnical group is a "social group within a cultural and social system that claims or is accorded special status on the basis of complex, often variable traits including religious, linguistic, ancestral, or physical characteristics."

DRASTIC IMPACT OF CONVENTION ON OUR SYSTEM OF GOVERNMENT

Second. Article II, section 2 of the Constitution provides that "the President shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur." Article VI of the Constitution provides that "the Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

If the Senate should ratify the Genocide Convention, these constitutional provisions would automatically make the Convention the law of the land, put all of its self-executing provisions into immediate effect as such, and impose upon the United States the obligation to take whatever steps are necessary to make its non-self-executing provisions effective. This means that the provisions of the Genocide Convention would immediately supersede all State laws and practices inconsistent with them, and would nullify all provisions of all acts of Congress and prior treaties of the United States inconsistent with them.

While Congress could repeal provisions of the Genocide Convention by future legislation, the States would be bound by them as long as the Convention remained in effect. Moreover, the Genocide Convention would immediately require and authorize Congress to enact legislation implementing its provisions, even though such legislation were beyond the power of Congress in the absence of the Convention, and even though such legislation would deprive the States of the power to prosecute and punish in their courts acts condemned by articles II and III of the Convention.

Surely, the Senate should pause and ponder what the impact of the ratification of the Genocide Convention would have on our system of government.

It is noted that virtually all the other nations of the earth have no constitutional or legal principle similar to article VI of the Constitution of the United States making treaties "the supreme law of the land," and that for this reason treaties do not take effect as internal law in other nations unless their legislative branches of government adopt laws subsequent to their ratification giving them such effect.

Third. One of the most drastic impacts the ratification of the Genocide Convention would have upon our system to government is in the criminal field. If the Senate should ratify the Genocide Convention, the duty and the power to prosecute and punish criminal homicides, assaults and batteries, and kidnapings covered by categories (a), (b) and (e) of article II of the convention would be forthwith transferred from the states which have always had such duty and power in respect to these crimes to the Federal Government. To make this transfer of justification workable, Congress would be required to enact new laws laying down rules of procedure to govern the trial of these newly created Federal and international crimes. Pending the passage of such laws, our country would experience utter confusion in the administration of criminal justice in respect to homicides, assaults and batteries, and kidnapings.

Proponents of ratification may argue that many homicides, assaults and batteries, and kidnapings would not fall within the definition of genocide. This contention accentuates rather than minimizes the folly of ratifying the Genocide Convention.

As has been pointed out, virtually every person in America falls within one or more of the four groups designated in the Genocide Convention, and any offense denounced by the Genocide Convention against any one of them would ostensibly fall within the scope of the convention. The jurisdiction of the Federal courts under the Genocide Convention would not depend upon what the jury found in particular cases. It would depend upon the allegations made in the indictments or informations charging the offenses.

Consequently, we can reasonably expect that demands will be made that every homicide, every assault and battery inflicting serious injury, and every kidnaping shall be tried in a Federal court, or in an international court to be established pursuant to the convention. What this will do to increase the congestion in the already overburdened Federal courts of our land beggars description.

In the absence of ratification of the convention, demands have already been made that the United Nations investigate the slaying of Black Panthers by police officers on the ground that their slaying constituted genocide under article II(a), and that the United Nations investigate the action of the legislature of one State in respect to welfare benefits on the ground that the legislative action constituted genocide under article II(c).

I respectfully suggest that the Senate should pause and ponder whether it is desirable to ratify a convention which would necessitate a fundamental alteration in the way in which criminal justice has been administered in the United States ever since our country come into existence as a free republic.

When the subcommittee of the Senate Foreign Relations Committee considered the Genocide Convention in 1950, it clearly recognized that ratification of the convention would play havoc with our system of administering criminal justice in respect to domestic crimes made Federal and international crimes by articles II and III, and for this reason decided that the Senate should not ratify the convention in any event without making this declaration:

In giving its advice and consent to the ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, the Senate of the United States of America does so considering this to be an exercise of the authority of the Federal Government to define and punish offenses against the law of nations, expressly conferred by article I, section 8, clause 10 of the United States Constitution, and consequently, the traditional jurisdiction of the several States of the Union with regard to crime is in no way abridged.

Confusion in the administration of criminal justice in respect to domestic crimes made Federal or international crimes by the Genocide Convention would not disappear with the enactment of legislation by Congress implementing the convention. The validity of this observation may be illustrated by taking a single crime, that of unlawful homicide. Under the Constitution of the United States, Congress does not have the power to make unlawful homicides generally Federal or international crimes. If ratified by the Senate, the Genocide Convention would give Congress this power in respect to homicides constituting genocide under the definition contained in the convention. Jurisdiction to prosecute and punish other unlawful homicides would remain in the State.

The only distinction between unlawful homicides remaining in the jurisdiction of the States and unlawful homicides transferred by the Genocide Convention and Acts of Congress implementing it to the Federal Government would depend upon whether the homicide is committed with genocidal intent. As a consequence, every unlawful homicide would apparently be within the jurisdiction of both the Federal and the State government insofar, as the external circumstances of the slaying are concerned.

Hence, either State or Federal courts could assert jurisdiction in respect to virtually all homicides, and an acquittal of the charge in one court would not bar a second prosecution based on the same facts in the other court. This being true, a person could be twice placed in jeopardy for the same offense.

The power of a Federal court to try a person for a homicide on the ground that it constitutes genocide depends upon the allegations of the indictment and not upon the ultimate finding of the jury. On a trial in the Federal court, the jury would be compelled to acquit the accused of genocide unless it found that he acted with the requisite genicodal intent, no matter how atrocious the circumstances attending the homicide otherwise might be. In such a case, the accused would go unwhipped of justice unless he was placed upon trial a second time in a State court.

The Senate should be slow to ratify any convention which would make such confusion in the administration of criminal justice in cases of this kind.

MEANING OF CONVENTION SHROUDED IN UNCERTAINTY

Fourth. If the Senate should ratify the Genocide Convention, it would place obligations upon the United States to prosecute and punish as genocides acts whose nature the convention fails to disclose and to take steps whose nature the convention fails to reveal.

If the convention is ratified, article II(b) would impose upon the United States the duty to prevent and to prosecute and punish public officials and individuals who cause "mental harm to members" of any one of the four groups named in the convention. What mental harm means in this context is totally incomprehensible, and what psychological acts or omissions are made punishable in this context are left in obsurity. When the Subcommittee of the Senate Foreign Relations Committee considered the Genocide Convention in 1950, it reached the conclusion that the Senate ought not to ratify the Genocide Convention in any event unless it expressed this understanding:

"That the United States Government understands and construes the words "mental harm" appearing in article II of this Convention to mean permanent physical injury to mental faculties."

If the convention is ratified, article II(c) would impose upon the United States the duty to prevent and to prosecute and punish anyone who deliberately inflicts "on the group conditions of life calculated to bring about its physical destruction in whole or in part." What this means, no mind can fathom. Does it mean that a State or county official who refuses to give to a member of one of the four groups designated in the convention the amount of welfare benefits deemed desirable is to be punished or prosecuted for genocide? Does it mean that the Court of International Justice shall have power under article IX to adjudge that Congress or a State legislature which does not make available to members of one of the four groups what the Court deems to be adequate welfare benefits has violated the convention?

If the convention is ratified, article III(c) makes any official or individual in our land punishable for "direct and public incitement to commit genocide." What does this mean? Does it mean that the convention undertakes to make a Senator or a Congressman punishable for genocide if he makes a speech outside of the Chamber of his respective House in which he justifies the action of Arabs in killing Jews, or the action of Jews killing Arabs? Does it undertake to deprive public officials and citizens of America of the right to freedom of speech with respect to matters falling within the terms of the Genocide Convention?

If anyone believes that the first amendment invalidates my apprehension on this score, let him read and ponder *Fox* v. *Washington*, 236 U.S. 273, and *Feiner* v. *New York*, 340 U.S. 315, as well as the majority and dissenting opinions in *Terminiello* v. *Chicago*, 337 U.S. 1.

If the convention is ratified, public offficials and private citizens of our land will be subject to punishment in Federal courts or possibly in international penal tribunals to be established under article VI if they are guilty of the undefined offense designated as "complicity in genocide." What is "complicity in genocide?" The convention does not say.

When the subcommittee of the Senate Foreign Relations Committee considered the Convention in 1950, it recognized the vagueness and uncertainty of this proposed Federal and international crime, and recommended that the Senate should not ratify this Convention in any event without stating the following reservation:

"That the United States Government understands and construes the words 'complicity in genocide appearing in article II of this Convention to mean particpation before and after the fact and aiding and abetting in the commission of the crime of genocide."

If the convention is ratified, article II would impose upon the United States the obligation to prevent and to punish as a crime under international law any act of genocide "whether committed in time of peace or in time of war," and article VIII would authorize any party to the convention to call on the United Nations to take such action against the United States under the charter of the United Nations it considers "appropriate for the prevention and suppression of acts of genocide, or any of the other acts enumerated in article III" occurring or likely to occur anywhere in the United States.

What actual obilgations does article I impose upon the United States with respect to events occurring either in peace or in war in lands beyond the seas? Does it require the United States to go to war to prevent one nation from killing the nationals of another nation? The Convention does not say, but article IX places the power to determine this question in the International Court of Justice.

Does artcile VIII imply that the United States agrees that the United Nations is to investigate or take action concerning the acts of public officials and individuals occurring within the borders of the United States? The convention does not say, but article IX leaves this determination to the International Court of Justice.

Able lawyers have expressed the fear that article VI imposes upon the Congress an implied commitment to support the creation of an international court for trials of American citizens for genocide. I find myself in complete harmony with their opposition to subjecting our citizens and other persons within our territorial jurisdiction to trail, conviction, and sentence for acts of genocide committed in the United States by an international penal tribunal where they would not be surrounded by the constitutional safeguards and legal rights accorded persons charged with a domestic crime.

CONVENTION MAKES SOLDIERS PUNISHABLE FOR SERVING THEIR COUNTRY IN COMBAT

Fifth. If the Senate should ratify the Genocide Convention, it would make American soldiers fighting under the flag of their country in foreign lands triable and punishable in foreign courts—even in courts of our warring enemy—for killing and seriously wounding members of the military forces of our warring enemy.

This is made indisputable by article I which provides that genocide is punishable under the convention whether it is committed in time of peace or in time of war, and by the fact that it contains no provision exempting soldiers engaged in combat from the coverage of the provisions of the convention. When soldiers kill or seriously wound members of a detachment of the military forces of a hostile nation, they certainly do so with intent to destroy, in whole or in part, a national group as such. Hence, their acts in combat fall clearly within the purview of the convention. In such cases, they are triable and punishable under article VI in the courts of the nation in whose territory their acts are committed, or in such an international penal tribunal "as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction."

These things being true, American soldiers killing or seriously wounding North Vienamese soldiers or members of the Vietcong, or South Vietnamese civilians in South Vietnam, are triable and punishable in courts sitting in South Vietnam, and American aviators who kill North Vietnamese soldiers or civilians in bombing raids upon targets in North Vietnam, and who fall into the hands of the North Vietnamese, are triable and punishable in the courts of North Vietnam. No sophistry can erase this obvious interpretation of the Genocide Convention.

CONVENTION SUBORDINATES THE AMERICAN GOVERNMENT TO THE WORLD COURT

Sixth. If the Senate should ratify the Genocide Convention, article I would impose upon the President, as the Chief Executive of the United States, the duty to enforce both the provisions of the convention and any acts of Congress implementing them as the supreme law of the land.

Article V would obligate the Congress to enact legislation to give effect to all the provisions of the convention, and to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III, and article VI would obligate the Supreme Court of the United States and all inferior Federal courts created by Congress to interpret and apply all of the provisions of the convention and of the acts of Congress implementing it to cases coming before them under the terms of the convention and the acts of Congress implementing such terms.

Seventh. If the Senate should ratify the Genocide Convention, it would bring into play article IX which provides that disputes between the parties to the convention relating to the "interpretation, application, or fulfillment" of the convention "shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Under this article the International Court of Justice would be empowered to decree that the President of the United States, as Chief Executive Officer of the United States, had interpreted and applied the provisions of the convention incorrectly and by so doing impose upon the President of the United States its notions as to how the convention should be interpreted and enforced; the power to adjudge that legislation enacted by Congress to give effect to the provisions of the convention was insufficient to fulfill the obligations imposed upon it by the convention; and the power to adjudge that the Supreme Court of the United States and Federal courts inferior to it had interpreted and applied the provisions of the convention incorrectly and by so doing require these tribunals to apply its notions as to how such provisions should be interpreted and applied to future cases coming before them.

When their attention is called to the drastic powers which the ratification of the Genocide Convention would bestow upon the International Court of Justice in respect to the President, the Congress, and the Supreme Court and other inferior Federal courts, the proponents of ratification assert that these agencies of the Government of the United States do not have to obey the rulings of the International Court of Justice if they deem that such rulings infringe upon the fundamental sovereignty of the United States. In so doing they ignore the solemn obligation assumed by the United States under article 94 of the charter of the United Nations which reads as follows:

"Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

The charter of the United Nations clearly contemplates that the United Nations will not interfere in the domestic affairs of any nation. The Genocide Convention goes a bow shot beyond the charter of the United Nations. it undertakes to regulate certain domestic affairs of the parties to it by converting what have always been domestic crimes into international crimes, and confers upon the International Court of Justice the vast powers set forth in article IX.

Consequently, if the Senate should ratify it, the Genocide Convention would render the Connally reservation, which was designed to prevent the International Court of Justice from exercising jurisdiction over any domestic affair of the United States, inapplicable to any of the matters covered by the convention, and would nullify the Vandenberg reservation to the jurisdiction of the International Court of Justice which stipulates that American acceptance of compulsory jurisdiction of the Court shall not apply to "disputes arising under a multilateral treaty, unless all parties to the treaty affected by the decision are also parties to the case before the Court, or the United States specially agrees to jurisdiction."

What I have said does not militate against the good intentions of those who drafted the Genocide Convention, or those who favor its ratification. All of us are opposed to the systematic, planned annihilation of any national, ethnical, racial, or religious group. The existing laws of the United States and its several States are adequate to punish all of the physical acts of violence denounced by the Genocide Convention. Hence the Senate does not need to ratify the Genocide Convention in order to make these acts punishable as crimes if committed within the borders of our land.

But the Senate should not permit itself to be persuaded by the good intentions of the proponents of ratification to ratify a convention which would have such a tragic impact upon the system of government which has always existed in our land, and which for the first time in our history undertakes to make undefined psychological harms inflicted in some undefined manner Federal and international crimes.

The American Bar Association has twice urged the Senate to reject the Genocide Convention—once in 1949 and again in 1970.

In closing, I urge every Senator to read the booklet entitled "The Convention on the Prevention and Punishment of the Crime of Genocide" prepared by 36 of the most distinguished and patriotic lawyers of America.

When this convention was originally submitted to the Senate for ratification or rejection, one of America's ablest jurists, Orie L. Phillips, chief judge of the U.S. Court of Appeals for the 10th Circuit, wrote an article entitled "The Genocide Convention: Its Effect on Our Legal System," which was published in the American Bar Association Journal for August 1949. I ask unanimous consent that the article be printed in the RECORD. I commend it to all Senators for their reading:

THE GENOCIDE CONVENTION: ITS EFFECT ON OUR LEGAL SYSTEM

(By Orie L. Phillips)

(NOTE.—In this article, Judge Phillips makes a concise, precise, analysis of the terms of the proposed Convention on the Prevention and Punishment of Genocide, and then discusses the effect of the Convention should it be consented to by the Senate. He points out that under the Constitution, a treaty is the supreme law of the land, superior to any state constitution or statute, and any existing federal statute, and that once a treaty has been approved by the Senate no further action is necessary to make it part of the municipal law of every state, binding upon individuals. While recognizing our international responsibilities, Judge Phillips questions the wisdom of this Convention and offers a suggestion that will carry out our international obligations without subjecting individual Americans to trial and conviction by a court that may not operate under the safeguards to an accused accorded by our legal system.)

On June 16, 1949, the President transmitted to the Senate the Convention on Genocide with the request that the Senate give its advice and consent to its ratification.

By this Treaty the contracting parties confirm that genocide is, "A crime under international law which they undertake to prevent and punish."

Articles II and III of the Convention read:

ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

ARTICLE III

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

Article V obligates the contracting parties to enact the necessary legislation to give effect to the provisions of the Convention and to provide effective penalties "for persons guilty of genocide or any of the other acts enumerated in Article III."

Article VI provides that "persons charged with genocide or any of the other acts enumerated in Article II shall be tried by a competent tribunal of the state" in which the act was committed, or by "such international penal tribunal as may have jurisdiction with respect to such contracting parties which shall have accepted its jurisdiction."

Article IX provides that disputes between the contracting parties relating to the "interpretation, application or fulfillment of the present convention," shall be submitted to the International Court of Justice at the request of any party to the dispute.

Thus, it will be seen that it is proposed by the action of the President, consented to by two/thirds of the Senators present [1] when Senate action is taken, to define certain acts, which have traditionally been regarded as domestic crimes, as international crimes and to obligate the United States to provide for their punishment and for the trial of persons accused thereof either in our domestic courts or in an international tribunal.

Treaty-making power is reviewed

It would seem appropriate, therefore, to review the treaty-making power.

Section 2 of Article II of the United States Constitution authorizes the President by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur.

The power is not one granted by the states. Neither did the powers of external sovereignty depend on the affirmative grants of the Constitution. If they had not been mentioned in the Constitution, they would have vested in the Federal Government as necessary concomitants of nationality. They embrace all the powers of government necessary to maintain an effective control of international relations.[2]

". . . the external powers of the United States are to be exercised without regard to state laws or policies."[3]

". . . the field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority.' "[4]

---

[1] See Art. II, § 2 United States Constitution.

[2] *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315–318.

[3] *United States* v. *Belmont*, 301 U.S. 324, 331.

[4] *United States* v. *Pink*, 315 U.S. 203, 232.

The treaty-making power is not limited by any express provision in the Constitution. But it does not authorize what the Constitution forbids and its exercise must not be inconsistent with the nature of our Government and the relation between the states and the United States.[5]

The treaty-making power is not subject to the limitations imposed by the Constitution on the power of Congress to enact legislation, and treaties may be made which affect rights under the control of the states.[6]

Treaty is equivalent to statute

A treaty, entered into in accordance with constitutional requirements, to the extent that it is self-executing, has the force and effect of a legislative enactment and to all intents and purposes is the equivalent of an Act of Congress. In addition to being an international contract, it becomes municipal law of the United States and of each of the states, and the judges of every state are bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.[7]

In the event of a conflict between a treaty made in accordance with constitutional requirements and the provisions of a state constitution or a state statute, whether enacted prior or subsequently to the making of the treaty, the treaty will control.[8]

But, a treaty may be abrogated by the enactment of a subsequent federal statute which is clearly inconsistent therewith.[9]

Thus, it will be seen that it is proposed that we set out on a course, under a power without express limitation and of broad scope, to enact domestic criminal law, without any concurrence by the House of Representatives, the body traditionally regarded as closest to the people.

Moreover, if the offenses involved should be regarded as international in character by Section 8 of Article I of the United States Constitution, Congress has the power "to define and punish . . . offenses against the law of nations."

Convention would become supreme law of land

Since the Convention in most respects is self-executing, in those respects, on ratification, it would become the supreme law of the land. That would not be true as to any other contracting party except France and a few other states. Even if non-self-executing, the obligation to implement the Treaty by legislation is as binding as the Treaty itself.

It is one of our fundamental concepts that a legislative body, in the exercise of its power to declare what constitutes a crime, must define it so as to inform persons subject thereto, with reasonable precision, what it intends to prohibit so they may have a certain and understandable rule of conduct and know what it is their duty to avoid. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." [10]

Do the definitions in Articles II and III of the Convention meet that test?

What is a part of a national, ethnical, racial or religious group—one member, two members, how many?

If an act was done with intent to destroy two members of a group, although actuated by no malice toward the group as such, would that be genocide?

Would it not be more accurate and desirable if the prerequisite intent was defined as an act committed with intent to injure one of the enumerated groups as such, so as to make it clear the act must be directed toward the group as such and not merely at an individual member or members thereof?

What is meant by mental harm?

Does not complicity mean the act of an accessory, or to aid, abet, assist, or incite genocide?

A person accused of an offense defined by the Convention, if tried by an international penal tribunal, would not be surrounded by the safeguards we accord persons charged with domestic crimes.

---

[5] *Asakura* v. *Seattle*, 265 U.S. 332, 341; *Holden* v. *Joy*, 84 U.S. 211, 243; *Geofroy* v. *Riggs*, 133, U.S. 258, 267.

[6] *Missouri* v. *Holland*, 252 U.S. 416, 432.

[7] See *Valentine* v. *Neidecker*, 299 U.S. 5, 10; *Whitney* v. *Robertson*, 124 U.S. 190, 194.

[8] *Santovincenzo* v. *Egan*, 248 U.S. 30, 40; *Nielsen* v. *Johnson*, 279 U.S. 47, 52.

[9] *Whitney* v. *Robertson*, 124 U.S. 190, 195; *Botiller* v. *Dominguez*, 130 U.S. 238, 247; 52 *Am. Jur. Treaties*, 818 § 21; Note, 134, *A.L.R.* 885.

[10] *Connally* v. *General Const. Co.*, 269 U.S. 385, 391.

Should we ratify Convention with reservations?

In the event we ratify the Convention, should we, by reservation, expressly provide that citizens of the United States and persons within the territorial jurisdiction of the United States, charged with an offense defined in the Convention will be subject to trial and sentence only by a competent judicial tribunal of, and sitting within, the United States, vested with jurisdiction over such offense by federal legislation; that a citizen or other person so charged shall be presumed to be innocent until his guilt has been established by lawful evidence beyond a reasonable doubt; that a citizen or other person so charged shall be protected by all the safeguards embraced within the Constitution of the United States, including the rights guaranteed by the Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution of the United States, to an accused charged with a domestic crime; and that such citizen or other person shall not be subject to be charged, tried, or sentenced by any international penal tribunal? Of course, no international penal tribunal has yet been created, and the advice and consent of the Senate would be necessary to subject our citizens to the jurisdiction of such a tribunal should it be created. But should we not endeavor to close the door to the giving of that advice and consent in the future?

Although the United Nations Charter provides that nothing therein contained shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state, since our representatives have participated in the drafting and approving of the Genocide Convention, if it should thereafter be ratified by the United States, would the matters embraced in such Convention be thereby withdrawn from our domestic jurisdiction?

Should we agree to submit to the International Court of Justice a dispute as to the interpretation, application, or fulfillment of the Convention by us? Suppose a citizen of the United States was charged with one of the offenses defined in the Convention—the group involved being an alien racial group—and tried in a competent tribunal in the United States, and our domestic courts, including the Supreme Court of the United States, should hold the act did not constitute an offense under the Convention. Could the state, of which the alien group were subjects, seek a review as to the intrepretation of the treaty in the International Court of Justice? If it could not seek a direct review, could it seek an interpretation by the International Court which would be binding on our domestic courts in the future?

Should we obligate the United States to undertake to prevent and punish genocide in other states? Such seems to be the import of Article I of the Convention.

I assume that no one will deny that the acts defined in the Convention as offenses are abhorrent and the purpose to prevent them wholly commendable. The question is as to the method and means to attain that end.

If genocide and kindred offenses defined in the treaty are in fact international crimes, would not the wise course be to enact domestic legislation under Section 8, Clause 10, Article I of the Constitution of the United States, defining such offenses, and providing for the trial and punishment of persons committing such offenses, in our own domestic courts, where the accused will be guaranteed his constitutional rights and accorded due process under our concept of that phrase? We would thus set our own house in order, would offer the same protection to the accused as one charged with any domestic crime, and would reserve to our own courts the final determination of questions as to the interpretation of the penal statute. To agree, by international convention, to so define, try, and punish persons who commit the offenses which the treaty undertakes to define, would seem to me to wholly fulfill our international obligation, and would avoid many serious questions with respect to the incipient effects of ratification of the Convention on our constitutional and legal system and questions of policy which will arise on a consideration of concurrence by the Senate in the proposed Convention.

SAM J. ERVIN, JR.
P. O. BOX 69
MORGANTON, NORTH CAROLINA 28655

AREA CODE 704
437-5532

March 11, 1985

Dear Senator:

I am 88 years old, and entertain no personal political ambitions. Nevertheless, I have prepared and am sending you and other Senators a statement that tells the plain truth about the Genocide Convention, a most unintelligent and unpatriotic proposal.

I do this because I love our country, revere the Senate as one of its institutions, and do not want the Senate to stultify itself by ratifying the Genocide Convention which is calculated and intended to have two drastic impacts on the United States and the fifty states. If ratified by the Senate, the Genocide Convention will do two things to impair the independence of the United States.

First, it will nullify sovereign powers now vested in the United States and the fifty states as members of a free Republic.

Second, it will subject them in respect to the areas covered by the nullified sovereign powers to the complete dominion of the World Court, an international body whose decisions are dictated by the foreigners who compose the overwhelming majority of its members.

I pray that those now serving in the Senate will emulate their predecessors who for 37 years have wisely, patriotically, and courageously refused to ratify this bizarre proposal.

Sincerely yours,

Sam J. Ervin, Jr.

Sam J. Ervin, Jr.
Senator from North Carolina for 20 years

SJE:mm
Enclosure

THE PLAIN TRUTH CONCERNING THE GENOCIDE CONVENTION

(Statement of Sam J. Ervin, Jr., of Morganton, N. C. 28655, who served in the Senate as a Senator from North Carolina from 1954 through 1974.)

I deeply regret that arthritis disables me to appear before the Committee in person, and express my opposition to the ratification of the Genocide Treaty, which calls itself the Genocide Convention.

I studied this proposal for many years, and made a speech on "Why The Senate Should Refuse To Ratify It" on May 25, 1970. This speech appears in the Congressional Record of that day, and I think merits the consideration of every Senator.

The Genocide Convention is undoubtedly the most bizarre treaty ever presented to the Senate for ratification.

Mark Twain is reputed to have said: "Truth is precious. Use it sparingly." I shall disobey his admonition, and tell the plain truth about this strange document.

For thirty-seven years the Senate has wisely and patriotically refused to ratify the Genocide Convention. It is devoutly to be hoped that intelligence has not forsaken the minds of Senators, and that love of country has not departed from their hearts; and that the present members of the Senate will follow the wise and patriotic decisions of their predecessors and refuse to ratify the Genocide Convention.

Inasmuch as I quote the words of the Genocide Convention to sustain what I say about it, I do not fear that my statement will be contradicted by any intellectually honest person who understands the provisions and implications of the Convention.

As its words reveal, there are cogent reasons to reject the Genocide Convention and not a single intelligent one for adding it to the supreme law of our land. I enumerate why the Senate should again refuse to ratify it.

1. The Genocide Convention is intellectually dishonest and deceptive.

Articles II and III of the Genocide Convention give false definitions to the term genocide, and thereby distort, pervert, and stretch it to cover multitudes of acts and persons wholly alien to the concept embodied in genocide.

According to its true meaning, genocide has always meant the systematic, and planned destruction or the complete wiping out of a designated (1) national, (2) political, (3) ethnical, (4) racial, or (5) religious group.

The Genocide Convention distorts and perverts the true meaning of genocide drastically in three ways.

First, the proposed treaty offers no protection to "political groups", and thus permits their total destruction. The drafters of the proposal did this to appease Soviet Russia, and induce it to join in it.

Second, Article II distorts and perverts genocide to mean certain acts "committed with intent to destroy, in whole or in part, a (1) national, (2) ethnical, (3) racial, or (4) religious group"as such, and to cover multitudes of persons and acts wholly alien to the true meaning of the term.

Manifestly, the distorted and perverted definition quoted above means that a public official or private individual is to be subject to prosecution and punishment under the Convention if he intentionally destroys a single member of one of the four specified groups.

Since an intent to destroy a single person belonging to one of the four designated groups would subject an official or an individual person to punishment, and since virtually every person on earth belongs to one or more of the four designated groups, the Genocide Convention would make virtually every person in any nation adhering to it a potential victim of genocide as the meaning of that term is distorted and perverted by the Convention.

The third distortion and perversion of the term genocide made by the Genocide Convention is that unlike true genocide it does not require the destruction of a person belonging to one of the four designated groups.

In addition to defining the killing of members of a designated group as a genocide act, Article II of the Genocide Convention distorts and perverts the true meaning of the term genocide by creating four additional genocidal acts. They are:

(1) Causing serious bodily or mental harm to members of the group; (2) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (3) imposing measures intended to prevent births within the groupl and (4) forcibly transferring children of the group to another group.

It is submitted that several of these newly-created genocidal acts are couched in general terms, and that it is virtually impossible to anticipate what specific acts or omissions they embrace. For example, what does "causing ... mental harm" mean? Does an administrative officer cause mental harm to an applicant for relief when he denies him the relief he desires? Does a Senator cause mental harm when he refuses to vote for a measure one of the designated groups ardently desires? Does the President cause mental harm to a prisoner by denying his petition for a pardon or parole?

Article III of the Genocide Convention further distorts and perverts the term genocide by providing that these acts embodying the distorted and perverted definitions shall be punishable as crimes: (1) genocide; (2) conspiracy to commit genocide; (3) direct and public incitement to commit genocide; (4) attempt to commit genocide; and (5) complicity in genocide.

By distorting and perverting the term genocide in the respects enumerated, the drafters of the Genocide Convention deceive multitudes of people into believing that the Convention is merely designed to punish genocide according to the true meaning of the term, and thus hide from them the truth that the Genocide Convention is calculated and intended to make punishable multitudes of persons and many acts alien to the true meaning of the term.

I put this question to each member of the Senate: How can any intelligent and intellectually honest Senator who loves our country and abhors deception vote to ratify the Genocide Treaty and thus make our nation a party to an instrument which distorts and perverts the plain meaning of words to deceive the public into believing that the Convention makes nothing punishable except true genocide?

2. If it should ratify the Genocide Convention, the Senate would make its provisions a part of the law of the land, and play havoc with the administration of justice under the legal systems which have prevailed in America since the United States became a Free Republic.

Upon ratification, a treaty acquires a status in America which has no counterpart in any other nation. The provisions of the treaty do not become domestic laws in other nations unless they are enacted as such by their legislative bodies after ratification. It is otherwise in the United STates. This is because Article VI of the Constitution provides:

> This constitution, and the laws of the United States which shall be made, in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state should be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

This constitutional provision and Articles IV and V of the Genocide Convention will play havoc with the division now existing between the Federal government and the states in respect to jurisdiction over criminal cases, and clog the dockets of Federal and state courts so greatly as to hinder the effective discharge of their judicial duties.

If the Senate ratifies the Genocide Treaty, the federal and state courts will be compelled by Article VI to try and punish all "constitutionally responsible rulers, public officials, or private individuals" who commit any of the acts denounced by the Convention.

This article would impose a tremendous burden on the already clogged courts because under the constitutional provision cited above every self-executing provision of the ratified Genocide Treaty would become effective on ratification as domestic federal or state law.

If the Senate should ratify the proposed treaty, the courts would soon be compelled to try and punish persons committing non-executing provisions of the Treaty. This is true because Article V of the Treaty would obligate Congress, and

the legislatures of the fifty states "to enact necessary legisation to give effect to all provisions of the treaty and provide penalties for all persons guilty of genocide"as that term is distorted and perverted by the Convention and "of any of the other acts enumerated in Article III" of the Treaty.

It beggars the most vivid imagination to even conjecture how many new crimes compliance with these requirements would create for America.

In addition to this, the ratification of the proposed Genocide Treaty would create unprecedented and virtually insurmountable confusion in the administration of criminal justice in America.

If the Senate should ratify the Genocide Treaty, the duty and the power to prosecute and punish criminal homicide, assaults and batteries, and kidnappings covered by categories (a), (b) and (e) of Article II of the Convention would be initially transferred from the states which have always had such duty and power in respect to such crimes to the federal government.

To make this initial transfer of jurisdiction workable, Congress would be required to enact new laws laying down rules of procedure to govern the trial of these newly created federal crimes. Pending the passage of such laws, our country would experience utter confusion in the administration of criminal justice in respect to homicides, assaults and batteries, and kidnappings.

Proponents of ratification may argue that many homicides, assaults and batteries would not fall within the definition of genocide, even as that term is distorted and perverted by the Convention. This is true, but this contention accentuates rather than minimizes the folly of ratifying the Genocide Convention.

As has been pointed out, virtually every person in America falls within one or more of the four groups designated in the Genocide Convention, and any offense denounced by the Genocide Convention against any one of them would ostensibly fall within the scope of the Convention.

The jurisdiction of a federal court under the Genocide Convention would not depend in the first instance upon what juries might ultimately find in particular cases. It would depend upon the allegations made in the indictments or informations charging the offenses.

Consequently, we can reasonably anticipate that demands will be made that every homicide, every assault and battery inflicting serious injury, and every kidnapping shall be tried in a federal court or in an international court to be established pursuant to the Convention. What this will do to increase the conjestion in the already overburdened federal courts beggars description.

In the absence of ratification of the Convention by the Senate, demands have already been made that the United Nations investigate the slaying of Black Panthers by the Chicago police on the ground that their slaying constituted genocide under Article II(a), and that the United Nations investigate the action of the legislature of one state in respect to welfare benefits on the ground that the legislative action constituted genocide under Article II(c).

I respectfully suggest that the Senate should pause and ponder whether it is desirable to ratify a Convention which would necessitate a fundamental alteration in the way in which criminal justice has been administered in the United States since our country came into existence as a Free Republic.

Confusion in the administration of criminal justice in respect to domestic crimes made federal or international crimes by the Genocide Convention would not disappear with the enactment of legislation by Congress implementing the Convention.

The validity of this observation may be illustrated by considering a single crime, unlawful homicide.

Under the Constitution, Congress does not have the power to make unlawful homicides generally federal or international crimes. If ratified by the Senate, the Genocide Convention would confer this power in respect to homicides constituting genocide under the distorted and perverted definition contained in the Convention. Jurisdiction to prosecute and punish other unlawful homicides would remain with the states.

The only distinction between unlawful homicides remaining in the jurisdiction of the states and jurisdiction of unlawful homicides vested in the federal government by the Genocide Convention and acts of Congress implementing it would depend on whether the homicide is committed with a genocidal intent as that term is defined in the Convention. As a consequence, every unlawful homicide would apparently be within the jurisdiction of the federal or state governments insofar as the external circumstances of the slaying are concerned.

Hence, either state or federal courts could assert jurisdiction in respect to virtually all homicides, and an acquittal of the charge in one court would not bar a second prosecution based on the same facts in the other court. This being true, a person could be twice placed in jeopardy for the same offense.

As we have seen, the power of a federal court to try a person for a homicide on the ground that it constitutes genocide under the Genocide Convention depends on the allegations of the indictment and not on the ultimate findings of the jury.

On the trial in the federal court, the jury would be compelled to acquit the accused unless it found that he acted with the requisite genocidal intent, no matter how atrocious the circumstances attending the homicide otherwise might be. In such a case, the accused would go unwhipped of justice unless he is placed on trial a second time in a state court.

I put this question to each member of the Senate: How can any intelligent Senator who loves his country vote to ratify a Convention which is calculated, if not intended, to play such havoc with the system of administering criminal justice which has prevailed in America since it became a Free Republic?

3. If the Senate should ratify the Genocide Convention, American soldiers who fight for our country against a foreign foe in lands beyond the sea would be subject to trial and punishment for violation of the Genocide Convention in a court of the foreign foe or in such an international penal tribunal as may be established to enforce the Convention where the protections of the Bill of Rights against unjust convictions or unjust punishments are not recognized or enforced.

This observation is made indisuptable by Article I of the Genocide Convention which provides without exception or limitation for soldiers or any other persons that genocide as distorted and perverted by the Convention "whether committed in time of peace or in time of war, is an international crime" which "the parties to the Treaty undertake to prevent and to punish."

Article VI of the Genocide Convention provides that persons charged with genocide as that term is distorted and perverted by the Convention "or any of the other acts enumerated in Article III", shall be tried by a competent tribunal of the nation in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction with respect to parties to the Convention which shall have accepted its jurisdiction."

Manifestly soldiers or former soldiers charged with violation of the Treaty are among the persons covered by Article VI of the Treaty.

If the Senate should ratify the Genocide Treaty, the United States would pledge itself by Article VII of the Treaty to expedite the trial and punishment of American soldiers or former soldiers, who had returned home from a war with a foreign foe in a foreign land, by granting their extradiction to the foreign land for trial and punishment in the genocide cases.

I put this question to all members of the Senate: How can any intelligent Senator who loves our country vote to ratify a Convention which sanctions the trial and punishment in the court of a foreign foe or in an internal penal tribunal of an American soldier whose only offense is that he killed or wounded an enemy of the United States while fighting for his country in a land beyond the seas?

Article VIII further specifies that any party to the Convention may call on any organ of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of "acts of genocide or any other acts enumerated in Article III."

4. If the Senate should ratify it, the Genocide Convention would forthwith rob the United States and the fifty states and transfer from them to the World Court the sovereign power of the United States to make any final decision concerning anything embraced by the Convention.

This is the manifest objective of Article IX of the Treaty which provides that disputes between parties to the Treaty "relating to (1) the interpretation, (2) the application, or (3) fulfillment of the present Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

By virtue of Article IX, the World Court has supreme and unreviewable authority to make the final decision concerning any question arising under the Convention if a dispute exists concerning it between parties to the Convention and its jurisdiction is invoked by either party to the dispute.

In these events, the World Court would have plenary power to overrule or modify any ruling of the Supreme Court of the United States, or of any other federal court, or of any state court interpreting the Convention; to nullify or alter any decision of the President, or any Governor, or any federal or state executive officer applying the provision of the Convention; to nullify any act of Congress or any state legislature as a failure to perform the obligation imposed on it by Article V of the Convention to enact the necessary legislation to give effect to the provisions of the Convention; and to determine whether or not any provision of the Convention has been fulfilled in any instance.

How can any Senator who entertains an intelligent love for his country vote to ratify an instrument which thus subordinates the United States and the fifty states to the World Court?

5. An unanswered constitutional question.

The power of the Senate to ratify or reject treaties is created by Section 2 of Article II of the Constitution, which stipulates that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

In telling the truth about the Genocide Convention, the designs of those who drafted it, and what its ratification by the Senate would do to the system of government ordained by the Constitution, I do not raise or attempt to answer this crucial constitutional question: Does Section 2 of Article II of the Constitution confer on the Senate the power to ratify a treaty which robs the United States of any of its sovereign powers as a Free Republic?

It is inconceivable to me that Section 2 of Article II, or any other provision of the Constitution, empowers the Senate or any other instrumentality of the United States to destroy, in whole or in part, sovereign powers belonging to the United States as a Free Republic. Hence, I assert with complete conviction that the Senate does not possess the constitutional power to ratify the Genocide Convention.

6. The duty of Senators to reject the Genocide Convention.

For years after its last rejection by the Senate, agitation for ratification of the Genocide Convention subsided, and it was largely forgotten by the public.

Unfortunately, however, it was resurrected during the national election campaign of 1984 as a political ploy to appease some of its ardent advocates, and has been submitted anew to the Senate. And unfortunately it now poses a potent

threat to constitutional government in America. This is true because pragmatic politicians are often tempted to assign priority to satisfying demands of constituents, no matter how repugnant to common sense, reason, and constitutional government those demands may be, over performing their supreme obligation to give our country sound government conforming to the Constitution.

Charity prompts me to believe that most people who urge the Senate to ratify the Genocide Convention do not understand its drastic provisions and implications.

Unlike people in general, however, Senators are charged with responsibility for understanding the provisions and implications of treaties submitted to them for ratification, and for casting votes in respect to them which are intelligent and harmonize with the best interests of our country.

Hence, no Senator can plead ignorance or political considerations to justify voting for ratification of the Genocide Convention. This is true because it is calculated and intended to rob the United States and the fifty states of part of their sovereign powers as constituent members of a Free Republic, and to subject their governments in substantial ways to the dominion of the World Court, an international agency controlled by the overwhelming foreign majority of its members.

The present members of the Senate will render a magnificent service to the United States, the fifty states, and constitutional government in our land if they will exercise the political courage to reject the Genocide Convention which bodes no good for the United States, the fifty states, and the American people.

March 6, 1985

Sam J. Ervin, Jr.
Former U. S. Senator from North Carolina

Senator HELMS. I thank both of you ladies for your eloquent testimony. I have been in contact with Senator Ervin frequently, as I said this morning. He is my mentor in constitutional matters, and I think there are several items that he wishes to be made a part of the record. If you will make sure that we find out precisely what he would like to have made a part of the record in addition to the specific reference made by Ms. Katson, we will do that.

It has been a long day. And you, most of all, deserve our thanks for your patience, because you sat and sat and sat.

Ms. KATSON. It was worth it for me to be able to address my remarks to you, Senator Helms.

Senator HELMS. I beg your pardon?

Ms. KATSON. I said it was worth it for me to wait this long to address my remarks to you.

Senator HELMS. Well, I just express my regret that there were not other Senators here. There are a lot of things to be done around this place, but I do not think there is any responsibility that we have that is more important than protecting the liberties of the people and the sovereignty of this country.

There being no further business to come before this committee, we will stand in recess.

Ms. SIDLER. Your Honor, may I say this? As a mother of three children and a grandmother, if this is passed, I hate to know what they will live through for generations to come. I am very concerned about that.

Senator HELMS. Thank you very much. The committee is adjourned.

[Additional questions and answers follow:]

STATE AND JUSTICE DEPARTMENT'S RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED FOR THE RECORD

Question I-1. Does the Genocide Convention, as distinguished from elements of customary international law, set the terms for the definition and punishment of acts which are called genocide?

Answer. The Genocide Convention sets forth the obligations under the Convention of states parties which ratify it. States parties undertake in Article I "to prevent and to punish" genocide and in Article V to enact "the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III" of the Convention. Genocide is also a crime under customary international law.

Question I-2. Is it the obligation of the Contracting Parties to effect legislation to implement the definitions and punishments set forth in the Genocide Convention?

Answer. States parties to the Genocide Convention undertake in Article V "to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III" of the Convention.

Question I-3. Are any of the norms of genocide set forth in the Genocide Convention at variance from U.S. Constitutional theory and practice.

(a) Article IV says that persons committing genocide shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals. Would not this require the United States to impose liability on judges acting within the scope of their legitimate authority?

(b) Would not article IV require the United States to impose liability on Members of Congress speaking or acting on the floors of their legislative bodies, despite the immunity clause of the Constitution?

(c) Does the wording of Article III(c), "Direct and public incitement to commit genocide," require the United States to impose a standard at variance from the Constitutional protections enunciated in *Brandenburg* v. *Ohio* (1969)?

(d) Do the standards proposed in Article II and III violate the Constitutional requirements of substantive due process, i.e., that they are arbitrary and capricious, vague and overbroad, and/or unreasonable in their substance and application? Explain.

Answer. *Reid* v. *Covert*, 354 U.S. 1 (1957), settled that no treaty or international agreement can confer power on the Government that is free from the constraints of the Constitution. Thus, no provision of the Genocide Convention could change the paramount duty of the President, the Congress and the Courts to uphold the U.S. Constitution. In our view, no provision of the Convention would "require" the United States to impose liability under domestic law for an act that was otherwise protected by the United States Constitution.

(a)-(b) The Administration believes there is no conflict between the U.S. Constitution and the obligations the United States would assume under the Genocide Convention. Our ratification of the Genocide Convention would not change the Constitutional protection enjoyed by these officials.

(c) As then Assistant Attorney General Rehnquist made clear in 1970 in his written response to questions from the Senate Foreign Relations Committee, the carefully drawn words of the Convention concerning "direct and public incitement to commit genocide" are consistent with the views of the Supreme Court concerning free expression, including its opinion in *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969).

(d) Criminal charges brought in United States courts for genocide would necessarily be based upon the terms of U.S. domestic implementing legislation rather than derived directly from the provisions of the Convention. That implementing legislation must fully satisfy constitutional standards of precision..

Question I-4. Is it the position of the U.S. Government that the U.S. Constitution is superior to any requirements of international obligations undertaken pursuant to our Constitution process, if these requirements conflict with the Constitution?

Answer. We believe there is no incompatibility between the U.S. Constitution and the Genocide Convention. If there were an irreconcilable conflict between the U.S. Constitution and a particular treaty, the Constitution would govern U.S. actions. If a provision of a treaty or actions taken to implement it should be found by a U.S. court to conflict with the Constitution, the Constitution would prevail as a matter of domestic law. This would be the case even though a treaty provision found unconstitutional would continue to constitute an obligation of the United States under international law until the obligation was reconciled or terminated in accordance with the rules of public international law, a view reflected in a 1984 report prepared for the Senate Foreign Relations Committee by the Congressional Research Service entitled "Treaties and Other International Agreements, The Role of the Senate."

Question I-5. Does customary international law hold that international agreements such as the Genocide Convention are superior to the national juridical arrangements of the Contracting Parties?

Answer. Customary international law does not speak in terms of the "superiority" of international or national arrangements. See also answer to question I-4.

Question I-6. If there is a variance between the standards of the Constitution and the standards of the Genocide Convention and these differences are irreconcilable, does it not follow that the United States must either be in violation of the Constitution or of the Convention?

Answer. The Administration does not believe that there is a variance between the Constitution and the Genocide Convention, particularly as clarified by the understandings that the Senate Foreign Relations Committee in 1984 recommended to be included in the Senate's resolution of advice and consent to ratification.

Question I-7. Is the International Court of Justice the only body competent to adjudicate disputes between the Contracting Parties of the Genocide Convention?

Answer. The only provision of the Genocide Convention which expresses the parties' obligations with respect to judicial settlement of disputes between parties is Article IX, which states that "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention . . . shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Question I-8. Does Article VIII allow any Contracting Party to call upon any other competent organs of the United Nations to take such action under the Charter as they consider appropriate for the prevention and suppression of acts of genocide?

Answer. Article VIII restates the existing competence of certain U.N. organs with specific reference to acts prohibited by the Genocide Convention. It does not constitute an independent grant of authority to any United Nations organ to take actions that that organ would be unable to take in the absence of Article VIII, nor does it overcome any limitations on the authority of that organ to act.

Question I-9. Could a Contracting Party call upon the General Assembly to make declaratory admonitions against the United States for alleged violations of the Genocide Convention?

Answer. A U.N. member State, whether party to the Genocide Convention or not, could accuse the United States or any other State or commission of genocidal acts either under customary law or as defined in the Genocide Convention, and seek a General Assembly resolution to that effect. This situation exists whether or not the United States ratifies the Convention.

Question I-10. Could Contracting Parties act against the United States in the General Assembly under a Uniting for Peace Resolution?

Answer. The United States adherence to the Genocide Convention per se would have no bearing on this matter. Under the Uniting for Peace resolution the General Assembly may choose to exercise its Charter responsibilities with respect to international peace and security by asserting the right to make "recommendations" to member States in cases involving a "threat to the peace, breach of the peace, or act of aggression," where the Security Council is unable to act due to the exercise of the veto by a Permanent Member.

The relevance of the Uniting for Peace Resolution to conduct proscribed by the Genocide Convention is dependent upon whether the complained-of conduct amounts to "a threat to the peace, breach of the peace, or act of aggression," rather than anything in the Genocide Convention itself. Thus, alleged genocidal acts in such circumstances could offer an occasion for invocation of the Uniting for Peace resolution (assuming the Security Council was paralyzed) whether or not the State concerned or the United States was party to the Genocide Convention.

Question I-11. Could the United States be expelled from U.N. agencies for alleged acts of genocide?

Answer. The Convention does not deal in any way with the eligibility of parties to remain members of international organizations.

Question I-12. Could allies of the United States have similar actions taken against them for alleged acts of genocide?

Answer. The legal considerations outlined in the answer to the previous question apply as well with respect to allies of the United States. Neither the U.S. ratification of the Genocide Convention, nor the terms of that ratification would affect the legal liability of any other party to the Convention vis-a-vis third States.

Question I-13. The United Nations either has the authority to take such sanctions against the United States and its allies, or it does not. If it does have such authority, it is reasonable to expect, in the highly politicized atmosphere of the United Nations, that this authority will be exercised?

Answer. As explained above, the Genocide Convention provides no additional power to the United Nations or any of its agencies, over that they may already possess, to adopt sanctions for alleged genocidal acts.

Question I-14. If the United States chooses to adhere to the U.S. Constitution in ways which require the modification or abandonment of the standards proposed in the Genocide Convention, would the International Court of Justice be obliged to rule that the United States is in default of its obligations under the doctrine of "pacta sunt servanda"?

Answer. United States ratification and implementation of the Genocide Convention can be accomplished in a manner entirely consistent with the U.S. Constitution and with the obligations imposed by the Convention. See also the answer to Senator Pell's fourth question.

Question I-15. If we ratify the Genocide Convention without reservations putting the other Contracting Parties on notice that we consider our Constitution to be superior to the Convention would we be making a good faith undertaking to carry out the obligations as written?

Answer. Yes. We believe that our ratification of the Genocide Convention with the understandings and declaration reported by the Senate Foreign Relations Committee in 1984 and with an appropriate reservation to Article IX of the Convention would constitute a good faith undertaking to carry out the Convention.

Question II-1. Article X states that the Chinese, English, French, Russian, and Spanish texts of the Convention are equally authentic. Article 39 of the Statute of the International Court of Justice declares that the official languages of the World Court are French and English. In the U.S. Senate, the Chair has ruled that only the

English language version of the text is before the Senate for debate, amendment, or approval of a resolution of ratification. Can the Genocide Convention be considered to be an enforceable contract where there are five versions in five languages, which can be discussed in only two languages before the World Court, and one language in the U.S. Senate?

Answer. Article X of the Genocide Convention states that the English, Chinese, French, Russian, and Spanish texts are equally authentic. This is a relatively standard clause for multilateral treaties.

The rule relating to interpretation of treaties authenticated in two or more languages is set forth in Article 33 of the Vienna Convention on the Law of Treaties and has been regarded by international tribunals as part of the customary international law. That article takes as a point of departure the presumption that the terms of the treaty have the same meaning in each authentic text. Paragraph 4 of Article 33 provides that when a comparison of the authentic texts discloses a different meaning which the general rules of treaty interpretation do not resolve, "the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

The Supreme Court has agreed that foreign language texts of treaties stated to be equally authentic with the English text will be equally binding on the United States. See *United States* v. *Percheman*, 7 Pet, 51, 89.

Article 39 of the Statute of the International court of Justice is concerned with the official languages of the International Court of Justice. It presents no bar to citing authentic texts of treaties in languages other than English and French. Indeed, in cases relating to interpretation of treaties in several languages it is customary for the parties to cite all language versions that support their cases.

As shown in the answers to the following questions, all five languages of the Convention are equivalent in all substantive respects.

Question II-2. If there are significant variances in the five versions of the Genocide Convention, which language and whose law would the ICJ apply in the event of a dispute between the United States and another Contracting Party represented by one of the four languages? For example, if we had a dispute with Nicaragua over the interpretation of the Convention as applied to events within the jurisdiction of Nicaragua, would the paramount text be Spanish?

Answer. See answer to the previous question.

Question II-3. Would it be wise to submit reservations concerning passages where there are significant differences in the texts of two languages, so that the other Contracting Parties are put on notice as to our interpretation of the agreement?

Answer. The Administration does not believe that there are significant differences between the texts of the various languages of the Genocide Convention, and therefore no reservations are required for this purpose.

Question II-4. Article I states, in English, that genocide "is a crime under international law." In French, it states that genocide "est un crime du droit des gens." In Spanish, it states that genocide "es un delito de drecho international." In English, the word under implies a general framework of customary international law; in French and Spanish, du and de imply a possessive genitive, indicating international law established by the Convention itself. Do you agree, and what are the implications?

Answer. The English, French and Spanish texts of Article I have the same meaning in all substantive respects. They all confirm that genocide is a crime under international law. The use of de in Spanish and du in French does not carry a different substantive meaning in this context from the English word "under".

Question II-5. Article VI states, in English, that persons charged with genocide shall be tried by competent tribunal of the State in the territory "of which the act was committed." Most commentators have assumed, without adverting to the word of, that tribunal would be in the territory in which the act was committed. Yet "of" is a much vaguer word in English, meaning only "related to." Thus, the act could be related to a territory, without taking place within the territory. Does this mean that a President of the United States, acting in Washington, could be sought for extradition to another territory which was affected by an act in Washington (without going into the question of whether extradition would be possible, but only sought)?

Answer. The Administration does not believe there is any ambiguity in this text. In any event, if a state had a criminal law which reached acts taking place outside its territory, it could seek extradition on that basis, whether or not the United States had ratified the Genocide Convention. As explained further in the answer to Senator Kerry's sixth question, the fact that a State sought extradition in any particular case, however, would not oblige the United States to grant it.

Question II-6. Article VI states, in French, that the tribunal would be "sur le territoire duquel l'acte a ete commis." This is more precise and restrictive than the English. Which text would be paramount?

Answer. The English and French texts of Article VI have the same meaning in all substantive respects.

With respect to the issue of which language text would prevail, please see answer to question II-1.

Question II-7. Article VI states, in Spanish "por un tribunal competente del Estado in cuyo territorio el acte fue cometido." If this text were applied to an action of the United States in a Spanish-speaking country, which text would be paramount?

Answer. The English and Spanish texts of Article VI have the same meaning in all substantive respects.

With respect to the issue of which language text would prevail, please see answer to question II-1.

Question II-8. According to expert opinion in the Library of Congress, the characters in the Chinese text which are supposed to represent "a national, ethnical, racial or religious group" are the following: [illegible]

Yet, the Chinese text does not present a noun, group, modified by five adjectives. Instead, there are four nouns standing alone, with only the fifth noun modified by an adjective. Thus:

[illegible] "national race"
[illegible] "race"
[illegible] "race"
[illegible] "religious group"

Furthermore, the second and third nouns are interchangeable to most Chinese readers, with only a slightly different nuance of meaning from the first noun. How can the Convention be enforced as a contract when all the authentic texts are not identical in meaning.

Answer. The characters on which this question are based were used in the original, superseded Chinese text of the Convention. They were officially altered and made more precise as part of a general correction of the Chinese text on December 12, 1952, at the 411th plenary meeting of the United Nations General Assembly. This corrected text is the one to which the United States would become a party under the Convention.

Individual English adjectives and nouns need not be translated word-for-word into Chinese to achieve an accurate translation. Chinese relies on characters to represent concepts, such as the idea of a "national group." In any event, the Chinese text, as amended in 1952, includes an additional character which indicates that each protected category of people constitutes a "group." Thus the concept of the four types of groups protected under the Convention which is articulated in the revised Chinese text correctly mirrors the concepts stated in Article II of the other texts of the Convention.

Question II-9. The last characters in the sequence, [illegible], are totally ambiguous to Chinese readers, meaning either "religious group" or "religious organization." Since an organization is considerably different from a group, does this change the impact of the Convention?

Answer. The English and Chinese texts of Article II have the same meaning in all substantive respects. The Chinese characters are properly translated into English as "group." Chinese, like English, would use a different set of characters to represent the narrower concept of "organization." Thus the Chinese characters are not susceptible to an ambiguous reading.

Question II-10. The English version of Article II(b) refers to "causing serious bodily or mental harm to members of the group." The French and Spanish versions say "Atteinte grave a l'integrite physique ou mentale de membres de group," and "Lesion grave a la integridad fisica or mental de los miembros del grupo," respectively. Yet the Chinese version refers to [illegible], meaning "spiritual harm," rather than mental harm. Do these differences not demonstrate that the language of this clause in Article II is vague and overbroad, and thus violative of the protection of substantive due process?

Answer. The English, Chinese, Spanish and French texts of Article II(b) have the same meaning in all substantive respects. The Chinese characters discussed in the question, if viewed in isolation, could be translated into English as either "mind" or "spirit." In the context of Article II(b), however, they would only be susceptible to translation as "mind." Thus the accurate translation of the entire Chinese clause would be the same as the English text, i.e., "causing serious bodily or mental harm

to members of the group." When read in context, the Chinese text of Section (b) of Article II is neither vague nor overbroad.

Question II-11. The English version of Article IV says that "constitutionally responsible rulers" shall be punished. The Chinese version says only that 統治者 , that is to say, "rulers" shall be punished. The French version says "des gouvernants," also meaning "rulers." The Spanish version says "gobernantes," also meaning "rulers" The English text thus introduces an additional element modifying the meaning to "constitutionally responsible" rulers, which is significantly different from the other texts. What is the meaning and impact of these differences?

Answer. The English, Chinese, Spanish and French texts of Article IV have the same meaning in all substantive respects. The phrase "constitutionally responsible rulers" in the English text was chosen after extended debate during the drafting of the Convention because the phrase most correctly translated the French word "gouvernants." Thus the English text cannot be characterized as "significantly different" from the other texts.

The Sixth Committee, in transmitting the Convention to the General Assembly for its consideration, gave the following explanation why the term "constitutionally responsible rulers" was chosen in the English text:

Whereas the expression used in the original French text, "des gouvernants, des donctionnaires ou des particuliers," was found satisfactory and consequentially retained by the Committee, it was pointed out by several representatives that the expression "Heads of State" used in the English text went beyond the French expression "gouvernants" as it would appear to include Heads of State of constitutional monarchies who, according to the Constitution of their country, enjoyed immunity and could not, for that reason, be brought to trial before a national court.

Question III-1. The concept of genocide arose from the actions of the Nazis against the Jews in World War II. Rafael Lemkin, writing in the American Journal of International Law in 1947, said, "The present writer was conscious of the great necessity of establishing a rule of international law which would make sure that 'revolting and horrible acts' committed by a government on its own citizens, to use the words of the Nuremberg Tribunal, should in the future not go unpunished." Was Lemkin right in asserting that the complicity of government was an established element in the crime of genocide?

Answer. Acts of genocide committed with the complicity of a government are included within the crime of genocide. We do not read the sentence written by Rafael Lemkin in the American Journal of International Law, however, to restrict the definition of genocide only to acts committed with the complicity of a government. In fact, the position of Professor Lemkin appears to have been that genocide includes actions of private persons. He assisted the U.N. Secretary-General in writing the draft Genocide Convention of March 28, 1947, which clearly included within the definition of genocide the action of private persons.

Nor is the definition of genocide in the Convention limited to acts committed with the complicity of the government. The drafters of the Genocide Convention specifically rejected an amendment which would have narrowed the crime of genocide to include only acts "committed, encouraged or tolerated by the heads of a State."

Question III-2. In response to Senator Pell, Assistant Secretary Abrams spoke of the desirability of raising the question under the Genocide Treaty of whether the mass murders which took place in Cambodia constituted genocide. How would such a question be framed, and in what forum?

Answer. These issues would need to be addressed in the light of circumstances which exist at the time the United States might decide to raise such questions. At such time, we would frame the question and choose the forum in a manner which would be the most appropriate in halting the conduct which we oppose.

Other countries in the past have raised the question of genocide in the United Nations in different ways. For example, in 1959 the Government of Malaya (now Malaysia) and Ireland sponsored a draft resolution in the U.N. General Assembly concerning the question of Chinese actions against Tibetans. Various member states, in the General Assembly's debate on these actions, condemned China's behavior. As a result, the General Assembly adopted unanimously a resolution which called for respect for the fundamental human rights of the Tibetan people.

In 1979, Canada led an effort by a number of Western countries in the U.N. Commission on Human Rights to denounce the atrocities committed in Cambodia by the Khmer Rouge. After extended debate on the events in Cambodia, the Commission postponed action on the matter until its next meeting in 1980. The Commission at that time adopted a resolution condemning "the gross and flagrant violations of human rights which have occurred in Kampuchea."

Question III-3. Does the Genocide Convention contemplate the prospect of taking nation-states before the ICJ and charging them with genocide?

Answer. Under Article IX of the Genocide Convention, disputes between states parties "relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a state for genocide or for any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of one of the parties to the dispute." Thus claims under the Convention by a State party that had not reserved to Article IX against another State party that had not reserved Article IX could be submitted to the Court under Article IX. Whether the Court would have jurisdiction to hear such a case, however, would depend on the facts of the case.

Question III-4. What is the meaning of the phrase in Article IX "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III . . ."?

Answer. As its plain language states, Article IX would allow the ICJ, upon the request of any party to the dispute that has not reserved to Article IX, to consider a dispute brought against another party that had not reserved to Article IX relating to the interpretation, application or fulfillment of the present Convention.

Question III-5. Does the word "responsibility" include allowing conditions which result in genocide, or active complicity with the crime?

Answer. Article IX provides that disputes under the Convention between states parties shall be submitted to the ICJ at the request of any party. Such disputes may include "those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III." Among the acts enumerated by Article III is the act of complicity in genocide. Whether a State could be held responsible for "allowing conditions which result in genocide, or active complicity with the crime" would depend on the facts in the particular case.

Question III-6. Under Article IV individual persons committing genocide are to be punished, and under Article V, the Contracting Parties agree to provide effective penalties to punish them. Do you interpret the Genocide Convention as requiring punishment for individuals committing private (i.e. without the complicity of the state) acts of genocide?

Answer. The Convention requires a state party to provide for effective penalties for any person guilty of genocide, including a person who commits genocide while acting as a private individual.

Question III-7. Without considering the effect of the Committee understanding of 1984 (No. 1), does the Convention on its face distinguish between genocide committed against one individual, and against an entire group?

Answer. The Convention defines genocide to mean any of the acts specified in Article II "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The negotiating record makes clear that this provision was not intended to cover cases where a single individual is attacked. See also answer to question III-12.

Question III-8. Understanding No. 1, interprets the phrase "intent to destroy, in whole or in part" a protected group by the prohibited acts "in such manner as to affect a substantial part of the group concerned." Does this additional phrase add an additional element to the Convention not present in the original text? Does it exclude or vary the provisions of the treaty insofar as it appears to limit the potential extent of culpability?

Answer. This understanding explains and clarifies the meaning of the Convention. It does not add an additional element to the Convention, nor does it exclude or vary the legal effect of the Convention's provisions.

Question III-9. Under the Vienna Convention or customary international law, may the ICJ or another Contracting Party take legal cognizance of an understanding attached to a resolution of ratification? What is its effect outside of domestic law?

Answer. Article XVII of the Genocide Convention provides that the Secretary General of the United Nations has the duty of notifying all members of the United Nations (and any non-members which have been invited to sign the Convention) of signatures, ratifications and acceptances received. Pursuant to that article he would bring the understandings incorporated in any U.S. instrument of ratification of the Convention to the attention of other States.

The scope of the obligation accepted by the United States is the obligation set forth in the instrument of ratification. If another country considers that a statement characterized as an understanding by the United States modifies the legal relationship under the Convention and objects to that modification, it may treat the

understanding as a reservation for international law purposes in accordance with the rules set out in Articles 21-23 of the Vienna Convention on the Law of Treaties, which reflect the customary international law relating to reservations. Substantial State practice consistent with this conclusion is set forth in an article entitled "The Legal Effect of Interpretative Declarations" in Volume 49 of the "British Year Book of International Law," 1978.

In 1984 the Congressional Research Service at the Library of Congress prepared a study for the Senate Foreign Relations Committee entitled "Treaties and other International Agreements: The Role of the United States Senate". Chapter V of that study deals with Senate consideration of treaties. Understandings to treaties are explained in section (C) of that chapter. Section (C) deals with constitutional approval of a treaty by the Foreign Relations Committee and by the Senate.

The topic of "understandings" is dealt with in the following terms: "understandings . . . are interpretative statements for the purpose of clarifying or elaborating, rather than changing, the provisions of the agreement. The actual effect of any particular proposed condition may, of course, be debatable. What may seem to the U.S. Senate to be a reasonable interpretation—and therefore an understanding—might appear to the other country or countries involved as an important modification—and therefore a reservation—particularly on an aspect of the agreement which is considered fundamental. If that is the conclusion of the other parties, of course, the mere characterization of a condition as an 'understanding' rather than a 'reservation' will do little to change that conclusion . . ."

Question III-10. In Understanding No. 1, what is the meaning of the word "affect"? Does it mean to destroy the group by causing the deaths of substantial numbers of the group, or could it mean to destroy the group, as such, through a single death of a leader, or a few deaths of leadership cadres, resulting in the physical dissolution of the group, or the permanent impairment of the mental faculties?

Answer. As then Legal Adviser Adrian Fisher indicated to the Senate Foreign Relations Committee on January 25, 1950, the activities of the type mentioned in Article, II, "killing, taking away children, and so forth, must be of a sort to affect a substantial number of the group." As defined in Article II, the act of genocide must be directed against a substantial part of the group. Whether an action would constitute genocide would depend upon the circumstances in an individual case. See also answer to question III-7.

Question III-11. With or without the understandings of 1984, could the Genocide Convention be interpreted as requiring the punishment of an individual, who, in a private act, kills a single individual with the intent of affecting a substantial part of the group to which the victim belongs?

Answer. We do not believe the Genocide Convention could reasonably be so interpreted.

Question III-12. In 1978, Mr. Nicodeme Ruhashyankiko, Special Rapporteur for the Commission on Human Rights of the United Nations Economic and Social Council, prepared a special report on genocide. He reported: "On the question of the extent to which a group must be destroyed before an act committed with the end in view can be termed genocide, it was generally agreed, during the debate in the Sixth Committee, that it was not necessary for the act to be aimed at a group in its entirely. It was sufficient that an act of genocide should have as its purpose the partial destruction of a group. Accordingly, an amendment . . . proposing the insertion of the words "in whole or in part" after the words "to destroy . . ." was adopted. The purpose of the amendment was to make it clear that it was not necessary to kill all the members of the group in order to commit genocide. However, the question was raised whether genocide existed when a single individual was the victim of an act aimed at the destruction of the group. During the elaboration of the Convention, it was argued that genocide existed as soon as an individual became the victim of an act of genocide; if there was intent to commit the crime, genocide existed even if only a single individual was the victim. The use of the expression "members of the group" in the second paragraph of the article . . . would indicate that genocide occurred as soon as a member of the group was attacked." In view of the fact that this debate is yet to be resolved in the UN, that the plain logic of the text indicates that victims of genocide die one by one, and that in understanding attached to domestic legislation is of doubtful impact in international fora, would not a reservation be more effective in establishing international agreement that genocide must be defined as intending the deaths of a substantial number of members of the group?

Answer. We believe the first understanding reported by the Committee in 1984 properly reflects the negotiating record of the Convention and adequately protects the United States. This understanding would be incorporated in the U.S. instrument of ratification which would define the terms of U.S. acceptance of the Convention.

It should be noted that in the same section as the quoted passage, the Special Rapporteur concluded that he had serious doubts as to including the situation where a single individual was a victim of genocide. As the Special Rapporteur noted, the prime object of the Convention "is clearly defined: the prevention and punishment of genocide as an act committed with the intent to destroy a large number of person. . .".

Question III-13. Since several Administrations have already approved an understanding (No. 1) which seeks to interpret the Convention so as to exclude the concept of genocide against one person, would it not be wise to further interpret the Convention as including the element of "complicity of government" in the crime so as to exclude purely private acts of an individual against an individual?

Answer. Such a condition is not necessary to exclude from the definition of genocide purely private acts of an individual against an individual, which are not committed with the specific intent provided for in Article II. Moreover, requiring the element of "complicity of government" for the crime of genocide so as to exclude private acts would represent a narrowing of the definition of genocide—a narrowing which was specifically rejected during the drafting of the Convention. We believe such an interpretation would also likely be considered a reservation to the Convention that could be interpreted as inconsistent with its object and purpose, and we would not favor such a condition.

Question III-14. Acting Assistant Attorney General Tarr stated that "Article II of the Convention defines genocide as the commission of one of the acts enumerated in the article with a *specific* 'intent to destroy in whole or in part a national, ethnical, racial, or religious group as such.'" In discussing the implementing legislation, he said, "we envision that in particular cases federal prosecutors would prove the intent underlying the federal crime of genocide in precisely the same manner as they would prove criminal intent under other federal criminal statutes relying upon defendants' statements, actions, or both in order to establish criminal intent." Later on, Mr. Tarr said, "genocide includes homocide with certain specific intent." Finally, Mr. Robinson said, "What it says in the Genocide Convention is, you need a specific intent to destroy a national, ethnical, racial, or religious groups as such." Where does the Genocide Convention say that "specific" intent is the standard?

Answer. In drafting the Genocide Convention, the parties clearly required, for an act of genocide, both the presence of a specific "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," and the commission of one or more overt acts defined in Article II. This requirement for a specific intent is found not only in the plain language of Article II requiring an intent to destroy a group "as such," but also in the negotiating record of the Article.

Question III-15. Mr. Tarr says that genocidal intent would be proved in U.S. courts exactly like other questions of intent. But U.S. courts, general intent is not enough; it is not sufficient in U.S. courts to demonstrate a general intent to do harm, to do violence, or to act negligently. Rather, the prosecutor must show a specific intent to achieve a future result, to achieve a particular consequence, to achieve a certain result, or to act recklessly in an outrageous manner. Is not the U.S. standard and practice much more tightly drawn? Does it not require higher standards of evidence and proof? Does it not contemplate a much smaller universe of persons potentially chargeable under such standards?

Answer. Both the Genocide Convention and the implementing legislation would require a specific intent to commit genocide. Thus, the standard of intent under domestic and international law would be congruent.

Question III-16. Since the U.S. implementing legislation would have to be drawn to exclude the majority of persons chargeable under the standard set up in the Convention, would not the United States be vulnerable to the criticism that we are using U.S. Constitution as an excuse to under-implement the Convention? Do not domestic standards clash with the loose international standards?

Answer. Both the Genocide Convention and the implementing legislation would require a specific intent to commit genocide. Thus, our domestic standards would not clash with international standards. We do not believe that the United States would be vulnerable to the criticism that we are not fully implementing the Convention.

Question III-17. U.S. standards for homicide allow for different degrees of murder. For first degree murder, the prosecutor has to demonstrate that the perpetrator had malice aforethought with an evil and malignant heart; that he acted with purpose, planning, reflection, calculation, deliberation, etc. Would you contemplate that U.S. implementing legislation would distinguish between first degree genocide and second degree genocide? Would the United States conscientiously fulfill its interna-

tional obligations by adopting distinctions that might lessen the effect of punishment as compared with the language set forth in the Convention?

Answer. The draft implementing legislation currently undergoing the interagency clearance process does not distinguish between first degree and second degree genocide. The Administration believes that the draft implementing legislation would conscientiously fulfill our international obligations to enact the necessary legislation to give effect to the Convention.

Question III-18. If the Convention sets forth a standard of general intent, instead of specific intent, would not our leaders and soldiers in time of war be vulnerable to charges of genocide raised in international fora? Indeed, in any conflict recognized under the international rules of war where religious or ethnic groups are in battle, it could easily be charged (and has been charged, e.g., against U.S. soldiers in Vietnam) that there is a general intent to destroy the opposing group. Under the principle that a predictable result must be assumed to have been intended, the vague standard of general intent in the Genocide Convention could be used for propaganda battles against the United States, Israel, South Africa and other allies who have already been accused of genocide. Would it not be wise simply to reserve acts of regular or irregular warfare, as defined in customary international law, from being considered as genocide? Is it not better to remove such grey-area issues from consideration in future propaganda battles?

Answer. Because as noted above the Genocide Convention requires both a specific intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," and the commission of one or more overt acts defined in Article II, we do not agree with the premise underlying this question the crime of genocide requires only a general intent. In light of this requirement, we do not believe our soldiers in Vietnam could be credibly charged with a specific intent to commit acts prohibited by the Convention.

On the other hand, a reservation broadly exempting warfare from the prohibitions of the Convention could create doubts about the U.S. commitment against genocide and could be used by other States to seek to justify actions that would otherwise come within the scope of the Convention. Such a reservation could arguably have encompassed Hitler's actions in World War II. In addition, in light of the clear statement in Article I that genocide is a crime, "whether committed in time of peace or in time of war," other States could be expected to object strongly to such a reservation as contrary to the intent of the Convention, if the United States were to so reserve.

We could point out that, even if the United States reserved to the definition of genocide so as to narrow its scope—an action the Administration would strongly oppose—this would in no way affect the legal position of other states, such as Israel, who have already accepted the Convention.

Question III-19. If a reservation were added for wartime acts, would not mass murder of civilians still be liable for punishment as war crimes or crimes against humanity?

Answer. As a general matter acts not falling within the scope of the Genocide Convention, but punishable on other legal grounds, would remain subject to prosecution or other legally available sanction on those grounds.

Question III-20. Article V states: "The Contracting Parties undertake to enact, in accordance with their respective constitutions, the necessary legislation to give effect to the provisions of this Convention . . . " The Special Rapporteur for UNESOC stated that "this obligation constitutes one of the main means of giving effect to the Convention." He then went on as follows:

"When the Sixth Committee of the General Assembly was preparing the final draft of the Convention the view was expressed that the 'constitutional reservation' might limit the scope of the Convention. According to this interpretation, the 'constitutional reservation' expresses the idea that the constitutions of States would prevail over the Convention to which those States are parties. In other words, some constitutional provisions might have the effect of limiting the scope of the Convention or rendering it partially inapplicable. The Special Rapporteur thinks that there is no reason to assume that the clause would have that effect firstly, because it can be interpreted as providing that a national law must be enacted in accordance with the constitutional procedures, which is quite normal. He therefore feels that this clause must be interpreted as relating to rules of form, rather than that of substance. Moreover, as one author has noted: 'If for some reasons or other legislative measures . . . prove to be illegal by reason of being . . . unconstitutional, such illegality under domestic law in itself does not constitute a breach of treaty because the fulfillment of treaty obligations is not tested and determined by municipal law but exclusively under international law itself.' This principle was confirmed by the 1969

Vienna Convention on the Law of Treaties. Indeed, Articles 27, entitled 'internal law and observance of treaties,' states that a State which is party to the treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

Do you believe that Article V relates "to rules of form, rather than of substance?

Answer. Article V constitutes an obligation by contracting parties to enact in accordance with their respective constitutions necessary implementing legislation. This is a relatively standard treaty provision. The Senate recently accepted similar language in the Convention for the Protection of Nuclear Material and the Convention on the Taking of Hostages.

The Administration belives there is no conflict between the United States Constitution and the obligations the United States would assume under the Genocide Convention, and therefore anticipates no difficulty implementing the Convention in accordance with the U.S. Constitution.

Question III-21. If there is a conflict between the U.S. Constitution and the Genocide Convention, which is superior in the view of the Administration?

Answer. We believe there is no incompatibility between the U.S. Constitution and the Genocide Convention. See also answer to I-4.

Question III-22. If there is a conflict between the U.S. Constitution and the Genocide Convention, can the conflict be cured by the implementing legislation?

Answer. In view of the Administration there is no conflict between the U.S. Constitution and the Genocide Convention. Thus, there is no conflict to cure by implementing legislation.

Question III-23. If there is a conflict between the U.S. Constitution and the Genocide Convention, which document is superior according to the Vienna Convention and customary international law?

Answer. We believe there is no incompatibility between the U.S. Constitution and the Genocide Convention. See also answers to questions I-4 and I-5.

Question III-24. If the United States withheld fulfillment of the Convention because of a conflict with U.S. Constitution, would the United States be in default of its international obligations even if the matter never came before the ICJ?

Answer. Whether or not the United States would be in default of its international obligations in these circumstances would depend on the facts of the individual case, without regard to whether the matter came before the Court.

Question III-25. What happens if, after passage of implementing legislation, and after deposit of the articles of ratification, the U.S. Supreme Court declares the implementing legislation unconstitutional? Would we then be in default of our international obligations?

Answer. Under Article V of the Convention, the United States "undertakes to enact, in accordance with [its] Constitution[ ], the necessary legislation to give effect to the provisions of the present Convention. . . ." (emphasis added). A definitive ruling by the Supreme Court, after the passage of the implementing legislation and after the deposit of the instrument of ratification, that the implementing legislation was unconstitutional could create a situation in which the United States would seek to reconcile its treaty obligation with the U.S. Constitution. Most likely, the United States would seek to enact new, constitutional implementing legislation. If the United States failed to enact such legislation within a reasonable time or otherwise reconcile the difference, but had not terminated the obligation, we could be found to be in default of our international obligations.

Question III-26. If the United States attaches a reservation declaring that it shall not obligate itself to any act or omission prohibited by the U.S. Constitution, and this reservation is not rejected by the Contracting Parties within a year, would not the United States thus preserve both its Constitution and its obligations under the Convention?

Answer. Such a reservation would be unnecessary to preserve the Constitution. On the other hand, it would render uncertain our international obligations under the Convention and would provide the states parties the opportunity to engage in interpretation of our Constitution in order to resolve that uncertainty.

Question III-27. In the 1984 understandings, No. 2 construed the words "mental harm" in Article II to mean "permanent impairment of mental faculties." In approving this understanding, did the Administration mean to include such permanent impairment as might result from psychological manipulation, economic or social deprivation, or loss of esteem through values disorientation?

Answer. During the negotiations of the Convention, the drafters explicitly rejected the notion that genocide included the concept of "cultural genocide." Thus activities of psychological manipulation, economic or social deprivation, or loss of self-esteem by themselves would not constitute genocide as defined in the Convention.

This is not changed by the Convention's reference in Article II to activities "causing serious . . . mental harm." As the negotiating history of the Convention makes clear, mental harm means the permanent impairment of mental faculties. This is faithfully reflected in the second understanding to the Genocide Convention proposed by the Senate Foreign Relations Committee in 1984, which reads as follows:

"That the United States Government understands and construes the words 'mental harm' appearing in Article II(b) of this Convention to mean permanent impairment of mental faculties."

Question III–28. If purely psychological impairment of a substantial part of the group is overly broad, would the phrasing be improved by specifically limiting it to deliberate and permanent physical impairment of the brain through torture, drugs, or similar techniques designed to cause such impairment?

Answer. We think that the United States is adequately protected by the second understanding reported by the Committee in 1984, which construes the words "mental harm" appearing in Article III(b) of the Convention to mean permanent impairment of mental faculties.

Question III–29. Article VI contemplates the establishment of an international criminal tribunal. The Special Rapporteur for UNESOC [sic] stated in 1979 [sic]:

"Those who opposed the attribution of jurisdiction to an international tribunal declared that the intervention of such a court would violate the principle of the sovereignty of the State because this court would be substituted for a national court. . . . The view was also expressed that the constitutional provisions of certain countries or the principle of the national sovereignty of States could not be adduced as an argument against the principle of the international punishment of genocide. The United Nations had, indeed, been established so that each State might realize its responsibilities and duties as a member of the community of nations. Member States would fail in their duty if, by taking an uncompromising stand on the provisions of their constitutions or the principle of their national sovereignty, they opposed the adoption of measures which proved to be necessary to the general interest."

Does the Administration take an uncompromising stand on the provisions of the U.S. Constitution?

Answer. The Executive Branch does not and would not propose that the United States accept any international obligation in conflict with the U.S. Constitution.

Question III–30. On December 12, 1950, the General Assembly, by resolution 489(V) established a committee composed of the representatives of 17 Member States, to prepare one or more preliminary draft proposals on an international penal tribunal. The committee on International Criminal Jurisdiction met at Geneva in August 1951, and prepared a draft for the international penal tribunal. A copy of that statute is attached. Setting aside the question of whether such a statute is currently under discussion within the United Nations (or whether such discussion is awaiting ratification of the underlying Genocide Convention by the United States), please comment in detail about the main features of the statute, whether it conforms with U.S. criminal procedure (including its prohibition of trial by jury), and whether in general it represents the kind of court to which the United States would extradite its citizens under current extradition procedures.

Answer. No substantive discussions have been held within the United Nations on the question of an international penal tribunal for nearly 30 years, and the draft statute must be considered, for all intents and purposes, and dead letter with no foreseeable prospect of resurrection. There is no reason to believe that ratification of the Genocide Convention by the United States or any other country would cause States to abandon their longstanding reluctance to establish, and submit themselves to the jurisdiction of, an international criminal tribunal. In addition, ratification of the Genocide Convention does not bind the United States to accept an international penal tribunal should one be created.

The version of the draft statute referred to in the question is the 1951 draft, which was subsequently revised in 1953. Because consideration of the international criminal tribunal was effectively discontinued, there has been no final version.

Because of the many uncertainties surrounding the statute at the preliminary stage which it had reached, it is not possible definitively to analyze the relationship between even the last version of the statute and the U.S. system of criminal justice. For example, the 1951 text in Article 37 provides that "[t]rials shall be without a jury." The revised 1953 text provides that "[t]rials shall be without jury, except where otherwise provided in the instrument by which jurisdiction has been conferred upon the Court." Thus, before one can analyze the compatibility of any statute of such a international criminal court with the U.S. Constitution, one would require not only the final version of that statute, but also the specific terms of the

instrument conferring jurisdiction on such a Court. More generally, the compatibility with U.S. law of various other provisions of such a court's statute would depend on matters not yet resolved, such as the exact terms of any final text, the court's procedures, its choice of law rules, and its rules regarding jurisdiction.

The issues surrounding such a court seem unlikely to be reexamined in the foreseeable future, or, if raised, to be resolved in a way which could meet the fundamental concerns of the United States as well as other countries. Discussions in the United Nations made it clear that there was a deadlock on such critical issues as due process of law to defendants in such a court; international enforcement and incarceration; the scope of offenses which would be considered by the court; the choice of applicable law; the choice of penalties; and avoidance of double jeopardy problems.

With such fundamental difficulties concerning such a court, the U.N. General Assembly discontinued further consideration of it in 1957.

Question III–31. During the hearings, Mr. Robinson asserted that the United States could only accede to such a statute by treaty, with the advice and consent of the Senate. Mr. Tarr, on the other hand, said that the President could accede to it by executive order, under certain conditions, offering as an example a resolution authorizing the President to accede to the statute. If the Congress were to pass such a resolution, which would require only a bare majority, would that fulfill the spirit of the Constitution which calls for the Senate to ratify treaties with the advice and consent of two-thirds of those present and voting? Under what other conditions could the President accede by executive order? Could he accede unilaterally, without approval from Congress in any form?

Answer. Under United States practice there are two constitutionally sanctioned procedures through which the United States may become a party to international agreements. The first procedure is the treaty procedure; the second is a procedure for international agreements other than treaties. These procedures are described in Section 721.2 of the Department of State's Circular 175 procedures (this document is reproduced as Appendix 4 to a 1984 study prepared by the Congressional Research Service of the Library of Congress for the Senate Foreign Relations Committee (98th Cong., 2d sess., S. Prt. 98–205)).

Treaties are international agreements (regardless of their title, designation or form) whose entry into force with respect to the United States takes place only after the Senate has given its advice and consent. The President, with the advice and consent of two-thirds of the Senators present, may enter into an international agreement on any subject genuinely of concern in foreign relations, so long as the agreement does not contravene the United States Constitution.

International agreements brought into force with respect to the United States on a constitutional basis other than with the advice and consent of the Senate are called "international agreements other than treaties." There are three constitutional bases for international agreements other than treaties as set forth below. An international agreement may be concluded pursuant to one of more of these constitutional bases:

(1) Agreements Pursuant to Treaty—The President may conclude an international agreement pursuant to a treaty brought into force with the advice and consent of the Senate, whose provisions constitute authorization for the agreement by the Executive without subsequent action by the Congress;

(2) Agreements Pursuant to Legislation—The President may conclude an international agreement on the basis of existing legislation or subject to legislation to be enacted by the Congress; and

(3) Agreements Pursuant to the Constitutional Authority of the President—The President may conclude an international agreement on any subject within his constitutional authority so long as the agreement is not inconsistent with legislation enacted by the Congress in the exercise of its constitutional authority. The constitutional sources of authority for the President to conclude international agreements include:

(a) The President's authority as Chief Executive to represent the nation in foreign affairs;

(b) The President's authority to receive ambassadors and other public ministers;

(c) The President's authority as "Commander-in-Chief"; and

(d) The President's authority to "take care that the laws be faithfully executed."

It appears that in accordance with the principles set out above, the United States could become a party to an international penal tribunal either by treaty or, at least by an agreement pursuant to legislation. This view is supported by section 307 of

the Revised "Restatement of the Foreign Relations Law of the United States" (Tent. Draft No. 1 1980), which states that "The President may make an international agreement with the authorization or approval of Congress dealing with any matter that falls within the powers of Congress and of the President under the Constitution." Comment b to that section further states as "[t]he prevailing view [of constitutional law scholars and courts] that the Congressional-Executive agreement can be used in all cases as an alternative to the treaty method. The judgment as to which procedure should be used is a political one, made in the first instance by the President, but the Senate might refuse to consider a joint resolution of Congress to approve an agreement, insisting on the treaty method." Id at 97. Reporter's Note 2 to that section further notes that "[c]ongressional-excutive agreements have in fact been made on a wide variety of subjects, and no such agreement has ever been effectively challenged as improperly concluded." Id. at 98. As authority for the proposition that the treaty method is not the exclusive method of adherence to international organizations, see also McDougal & Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy," 54 Yale L.J. 181, 534 (1945); L. Henkin, "Foreign Affairs and the Constitution" 173–76 (1972); 40 Op. Atty. Gen. (1946).

The precise form for accepting the jurisdiction of an international penal tribunal, should that ever be considered in the United States interest, would depend upon an examination of the circumstances at the time such decision were to be made; in any event, this Administration would not consider accepting the jurisdiction over Americans of an international penal tribunal except by treaty.

Question III–32. Would this Administration object to a reservation putting future Presidents and the other Contracting Parties on notice that the United States would not accede to the jurisdiction of an international penal tribunal without a treaty duly ratified?

Answer. We do not believe that such a reservation would be necessary. Ratification of the Genocide Convention does not bind the United States to accept an international penal tribunal should one be created. The plain meaning of Article VI indicates that States must accept an international penal tribunal separately from their ratification of the Genocide Convention. In the most unlikely event that such a tribunal were established and the United States were to determine that becoming party to its statute was in the national interest, the United States would follow its Constitutional processes in undertaking such an international obligation; in any event, this Administration would not consider accepting the jurisdiction over Americans of an international penal tribunal except by treaty.

U.S. DEPARTMENT OF STATE,
Washington, DC, April 25, 1985.

Hon. RICHARD G. LUGAR,
Chairman, Committee on Foreign Relations,
U.S. Senate.

DEAR MR. CHAIRMAN: Thank you for your letter of April 15 on the Genocide Convention. This letter represents a response on behalf of the Secretary of State and the Attorney General.

In that letter you asked us to answer additional questions regarding an international penal tribunal and the relationship of the U.S. Constitution to the Genocide Convention. The Committee and the Executive Branch are in fundamental agreement that under U.S. law the Constitution would take precedence over the Genocide Convention in the event of a conflict between the two. We also agree that the U.S. should ensure that our international obligations do not conflict with the Constitution. We remain prepared to work with the Committee in a search for language on the Constitution or a penal tribunal that would meet the Committee's concerns and ours, as we have previously indicated to you.

Our answers to your specific questions follow:

INTERNATIONAL PENAL TRIBUNAL

Question 1. Could a President adhere on his own authority to a convention creating an international penal tribunal?

Answer. At this time we cannot definitively answer your question whether some future President could, on his own authority, bind the Untied States to an agreement creating such an international penal tribunal. That question cannot be answered in the abstract, because the scope of the President's authority to enter international agreements would invariability depend upon the peculiar factual circum-

stances that existed when such a decision were contemplated, for example, whether the President were acting pursuant to a textual grant of constitutional authority, the precise scope of the international obligations being assumed in the proposed agreement, and the consistency of those obligations with then-existing requirements of U.S. law. Given that an international penal tribunal has not been under active consideration for more than thirty years, this Administration's declaration that it would not consider accepting such a tribunal's jurisdiction over Americans by any method other than treaty, and given that ratification of the Genocide Convention by itself would not in any way bind the United States to accept the jurisdiction of any tribunal that might someday be created, we are reluctant to offer speculations on this difficult constitutional question.

Question 2. [I]t would appear that no individual could be extradited to an international penal tribunal under current U.S. extradition procedures. Is this true?

Answer. Yes.

SUPREMACY OF THE U.S. CONSTITUTION

Question 3. With regard to Ambassador Goldberg's statement: Has any nation formally objected to his statement? Has any government ever said that his statement rendered U.S. obligations under the respective agreements uncertain? Has any government used his statement as an excuse to interpret the U.S. Constitution?

Answer. No, not to our knowledge. Statements at the time of signature of an agreement generally do not draw formal comment from other states. When the Racial Discrimination Convention was sent to the Senate in 1978, the President replaced Ambassador Goldberg's statement when signing the Convention with individual reservations that specified the particular areas of Constitutional infirmity that the President found in that Convention.

Question 4. With regard to the statements of Nepal, Mexico and India: Has any nation transmitted a formal objection to this statement to the U.N. Secretary General? To the best of the Administration's knowledge, has any nation used this statement as an opportunity to interpret or otherwise comment on that country's Constitution? Has any government said that that country's obligation under the Convention has been rendered uncertain by this statement?

Answer. No, not to our knowledge in these three cases.

Question 5. Does the Administration agree that human rights treaties are, by their nature, fundamentally different from other types of treaties such as arms control or commercial treaties?

Answer. No, human rights treaties are not fundamentally different from other treaties; human rights treaties may, however, be distinguishable from other types of treaties on specific points.

Question 6. Does it believe that a declaration about the supremacy of the U.S. Constitution such as the one Ambassador Goldberg made in 1966 goes to the heart of the Genocide Convention?

Answer. No, although some parties may believe so and could decline to enter into treaty relations with us under that Convention

Question 7. Does the Administration believe including such language in the resolution of ratification would necessitate renegotiation of the Convention?

Answer. No.

Question 8. Would it resist efforts by other nations to include language of this type in bilateral treaties?

Answer. Yes.

We hope that this information will be helpful in the Committee's deliberations. We stand ready to work with the Committee on these questions.

Sincerely,

WILLIAM L. BALL III,
Assistant Secretary, Legislative and Intergovernmental Affairs.

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC, April 15, 1985.

Hon. GEORGE P. SHULTZ,
Secretary of State,
Hon. EDWIN W. MEESE, III,
Attorney General,
Washington, DC.

DEAR MR. SECRETARY AND MR. ATTORNEY GENERAL: At the Foreign Relations Committee's March 5th hearing on the Genocide Convention, representatives of your Departments agreed to supply written responses to questions Committee members had about the Convention. All replies have now been received. On behalf of myself, as well as the Committee, I would like to express my appreciation to those who worked so hard on these replies. The information provided will be of great assistance to the Committee in its deliberations on the Convention.

While the great majority of the Administration's answers fully addressed members' questions, the Majority staff did find a couple of areas where the answers did not completely respond to members' concerns. These areas are set forth below. I would appreciate it if the Administration would answer the remaining questions as soon as possible. The Committee will mark up the Genocide Convention soon. I anticipate that these areas will be the subject of much discussion.

INTERNATIONAL PENAL TRIBUNAL

The Administration's answers to questions about U.S. participation in an international penal tribunal neglected two concerns members have about such a tribunal. First, it is not clear whether the Administration believes a future President could, on his own authority, bind the United States to an agreement creating an international penal tribunal. Second, the Administration did not say whether under current extradition procedures the U.S. would extradite individuals to a tribunal of the type proposed by a U.N. Commission.

The replies furnished by the Administration did state that a President could conclude an international agreement on his own authority only if "the agreement is not inconsistent with legislation enacted by Congress in the exercise of its constitutional authority." Under this standard, it would appear that a President would be unable to adhere on his own authority to a convention creating an international penal tribunal since such a convention would, of necessity, be inconsistent with several provisions of U.S. law. Is this correct?

The Administration was also asked about extradition from the U.S. to such a tribunal. Current extradition procedures, I am advised, are governed by statute. That statute provides that individuals may be extradited only to a foreign country. If this is true, it would appear that no individual could be extradited to an international penal tribunal under current U.S. extradition procedures. Again, is this statement true?

SUPREMACY OF THE U.S. CONSTITUTION

Members asked the Administration a variety of questions about the relationship between the U.S. Constitution and the Genocide Convention. In reply to one, the Administration stated that "If there were an irreconcilable conflict between the U.S. Constitution and a particular treaty, the Constitution would govern U.S. actions." However, when queried as to the propriety of inserting such a statement in the text of the resolution of ratification to accompany the Genocide Convention, the Administration stated that such language would "render uncertain our international obligations under the Convention and that it would also "provide the state parties the opportunity to engage in interpretation of our Constitution in order to resolve that uncertainty." I am sure that the reluctance of the Administration to acknowledge the supremacy of the U.S. Constitution in the instruments of ratification will be a major concern of Committee members. The following questions are designed to pinpoint the reasons for this reluctance.

In 1966 then-U.N. Ambassador Arthur Goldberg signed the International Covenant on the Elimination of All Forms of Racial Discrimination on behalf of the United States. At that time he made the following statement:

> The Constitution of the United States contains provisions for the protection of individual rights, such as the right of free speech, and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the

United States of America incompatible with the provisions of the Constitution of the United States of America.

When the Senate consented to the ratification of the charter of the Organization of American States it did so on the condition that nothing in the charter would be interpreted: "as enlarging the powers of the Federal Government . . . or limiting the powers of the several states . . . with respect to any matters recognized under the Constitution as being within the reserved powers of the several states."

Has any nation formally objected to either statement? Has any government ever said that either statement rendered U.S. obligations under the respective agreements uncertain? Has any government used either statement as an excuse to interpret the U.S. Constitution?

The Government of Nepal acceded to the International Convention on the Elimination of All Forms of Racial Discrimination on January 30, 1971. At that time, it made a statement about the supremacy of its Constitution almost identical to the one Ambassador Goldberg made about the U.S. Constitution in 1966. Has any nation transmitted a formal objection to this statement to the U.N. Secretary General? To the best of the Administration's knowledge, has any nation used this statement as an opportunity to interpret or otherwise comment on Nepal's Constitution? Has any government said that Nepal's obligation under the Convention has been rendered uncertain by this statement?

When the Government of Mexico acceded to the International Covenant on Economic, Social and Cultural Rights in 1981 it stated that Article 8 of the Covenant would be applied: "under the conditions and in conformity with the procedure established in the applicable provisions of the Political Constitution of the United Mexican States and the relevant implementing legislation."

Has any nation transmitted a formal objection to this statement to the U.N. Secretary General? To the best of the Administration's knowledge, has any nation used this statement as an opportunity to interpret or otherwise comment on Mexico's Constitution? Has any government said that Mexico's obligation under the Covenant has been rendered uncertain by this statement?

India acceded to the Covenant in 1979. It stated then that several provisions of the Covenant would be applied "in conformity with" various provisions of the Indian Constitution. Again, what formal objections to this statement have been filed with the Secretary General? What countries have used the statement to interpret the Indian Constitution? What countries have said India's obligation under the Covenant has been rendered uncertain by reason of this statement?

Former Supreme Court Justice and U.N. Ambassador Arthur Goldberg appeared before the Foreign Relations Committee in November of 1979. He testified that in consenting to the ratification of human rights treaties the Senate could include language in the resolution of ratification stating that the treaties must be interpreted to conform to the U.S. Constitution. He said that human rights treaties were unlike arms control treaties and other types of treaties "where amendments or even reservations may go to the heart of the treaty and may necessitate renegotiation." Does the Administration agree that human rights treaties are, by their nature, fundamentally different from other types of treaties such as arms control or commercial treaties? Does it believe that a declaration about the supremacy of the U.S. Constitution such as the one Ambassador Goldberg made in 1966 goes to the heart of the Genocide Convention? Does the Administration believe including such language in the resolution of ratification would necessitate renegotiation of the Convention? Would it resist efforts by other nations to include language of this type in bilateral treaties?

Thank you for your attention to this request. The replies will help the Senate comply with the President's request that the Senate give its consent to the ratification of the Genocide Convention.

Sincerely,

RICHARD G. LUGAR, *Chairman.*

STATE AND JUSTICE DEPARTMENT'S RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED BY SENATOR PELL

Question 1. One criticism of the Genocide Convention is that its definition of genocide is not sufficiently precise, and moreover that the definition of "intent" is not sufficient to satisfy traditional criminal law standards. Would you comment on this criticism?

Answer. As clarified by the two understandings to Article II reported in 1984 by the Senate Foreign Relations Committee, we think the terms of this Convention are

sufficiently precise. We are confident that the Congress, which has on a number of occassions implemented conventions by the enactment of criminal legislation, will define the domestic crime of genocide in terms that meet our constitutional standards.

Question 2. Another criticism of the Convention is the absence of the words "complicity of government" as an element of the crime of genocide. Critics have contended that it is extremely unlikely that genocide could be committed without at least the tacit approval of government of the country in which it occurred. What is the negotiation history of the Convention on this point and what is the Department's position on conditioning U.S. ratification of the Convention to a reservation or amendment specifying that "complicity of government" is an element of the crime of genocide?

Answer. Requiring the element of "complicity of government" for the crime of genocide so as to exclude private acts would represent a narrowing of the definition of genocide and might well be objected to by other parties. We do not believe it would be wise to narrow the concept of genocide to exclude groups acting without government complicity, and would not favor having such a condition to U.S. ratification.

The drafters of the Convention defeated, 40–2, an amendment by the French delegate which would have added to the definition of "genocide" the element that "it is committed, encouraged or tolerated by the heads of a State". As the U.S. delegate indicated, "in order to carry out resolution 96(I) of the General Assembly the Committee should draw up a convention designed to protect human groups against the acts of private individuals or of terrorist bands."

Question 3. Please provide a brief chronology of the record of the United States in cases before the World Court?

Answer. Apart from the pending Nicaragua case, the United States has been involved in 12 cases before the Court (other than those involving a request for an advisory opinion), beginning with the *Rights of Nationals of the United States of America in Morocco* case (*France* v. *United States*) in 1950–1952. That case, brought by France, involved a number of questions concerning rights of U.S. nationals in Morocco under certain 19th century treaties. The Court decided certain questions in favor of France, and others in favor of the United States.

The next case involving the United States was the *Monetary Gold Removed from Rome in 1943* case (*Italy* v. *France, United Kindgom and United States*) in 1953–1954, in which Italy brought suit for a determination as to its rights to certain gold in the custody of the Tripartite Commission for the Restitution of Monetary Gold, of which the United States and the other two respondents are members. The Court dismissed the case on the ground that its adjudication of the rights of Italy in the gold would require the determination of the competing claims of Albania, which was not party to the proceedings.

The next two cases were the companion *Treatment in Hungary of Aircraft and Crew of the United States of America* cases (*United States* v. *Hungary, United States* v. *U.S.S.R.*) in 1954, in which the United States brought claims arising out of the downing in Hungary of a U.S. military aircraft. Both cases were dismissed on the ground that the respondent States had not accepted the compulsory jurisdiction of the Court under Article 36(2) of its Statute. The two following cases, the *Aerial Incident of 10 March 1953* case (*United States* v. *Czechoslovakia*) and the *Aerial Incident of 7 October 1952* case (*United States* v. *U.S.S.R.*), both in 1955–1956, were dismissed for the same reason.

In the *Interhandel* case (*Switzerland* v. *United States*) in 1957–1959, Switzerland instituted proceedings arising out of the seizure of certain alien property by the United States during World War II. The United States responded by, inter alia, invoking the Connally reservation as a bar to certain of the Swiss claims. The Court dismissed the case on the ground that Switzerland had failed to exhaust available domestic remedies in the United States, and did not reach the Connally reservation issue.

The next case was the *Aerial Incident of 27 July 1955* case (*United States* v. *Bulgaria*) in 1957–1960, in which the United States brought claims for the lives and property of U.S citizens lost in the destruction by Bulgaria of an Israeli civilian aircraft. The case was dismissed on the motion of the United States, after Bulgaria invoked, on reciprocity grounds, the U.S. Connally reservation, claiming that it (Bulgaria) had determined that the dispute was one "essentially within the domestic jurisdiction" of Bulgaria.

In two subsequent cases against the Soviet Union, the *Aerial Incident of 4 September 1954* case in 1958 and the *Aerial Incident of 7 November 1954* case in 1959, the United States instituted proceedings as a result of the destruction by the Soviet

Union of U.S. military aircraft. Both cases were dismissed on the ground that the Soviet Union had not accepted the Court's compulsory jurisdiction.

The next case was the *United States Diplomatic and Consular Staff in Tehran* case (*United States* v. *Iran*) in 1979-1981, arising out of the seizure of the U.S. Embassy in Iran. Iran refused to participate in the proceedings before the Court. The Court issued an order indicating interim measures of protection, and rendered a final judgment, in favor of the United States, both of which were ignored by Iran. Further proceedings to determine the amount of damages owing to the United States were suspnded as a consequence of the 1981 Algiers Accords.

In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area* case in 1981-1984, the United States and Canada agreed by treaty to submit their boundary dispute in the Gulf of Maine to a five-member Chamber of the Court. The Chamber rendered its decision in October 1984.

Question 4. Given the record of the United States in the area of human rights, how serious is the concern that—in the absence of a reservation against Article 9 of the Convention—we could face trivial or frivolous charges in the International Court of Justice? Isn't it more correct to say that if the Court were to rule on a clearly political basis against the United States it would only serve to discredit the ICJ as a world organization?

Answer. The United States record on human rights is such that we find it inconceivable that any State could make a credible claim against the United States under the Genocide Convention. However, in order to preclude frivolous claims against the United States under the Convention and to clear the way for Senate advice and consent to the Convention after 37 years, the Executive Branch would support an appropriate reservation to Article IX.

Question 5. Is there anything to prevent unfriendly nations from bringing trivial or frivolous charges in the World Court against the United States, based on our acceptance of the Court's compulsory jurisdiction?

Answer. There is nothing to prevent unfriendly nations which have accepted the compulsory jurisdiction of the World Court from attempting to bring trivial or frivolous charges in the Court.

Question 6. In regard to the creation of an international penal tribunal, please set forth fully (including citations to case law or statute) the basis for a contention that U.S. adherence to the jurisdiction of an international penal tribunal could be accomplished by executive agreement rather than by exercise of the treaty power.

Answer. See answer to Question III-31.

Question 7. Is there any way that U.S. ratification of the Genocide Convention could force our country to extradite foreign diplomats on charges of genocide?

Answer. The 1949 Genocide Convention is not an extradition treaty, nor does it amend existing extradition treaties. Thus, the Convention itself would not obligate the United States to extradite persons accused of genocide. The 1961 Vienna Convention on Diplomatic Relations provides in Article 29 that "the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention." It contains no exception for diplomats accused of genocide. Indeed, it is doubtful that States would be prepared to assume any treaty obligation to extradite diplomats.

State and Justice Department's Response to an Additional Question Submitted by Senator Dodd

Question. During your testimony before the Committee on Foreign Relations you commented on a prospective reservation or understanding on the constitutionality of any implementing legislation that may be passed in fulfillment of our obligations under the Genocide Convention. You raised the possibility that such a reservation or understanding could open the way for the International Court of Justice or for other parties to the Convention to pass judgement on the constitutionality of United States legislation which is a question we certainly want to continue to regard as a purely domestic matter.

Can you elaborate on your concern?

Also, can you apply your response specifically to the following two texts suggested by Senator Helms, the first last fall as an understanding and the second this month as a "condition"?

1. That the United States Government understands and construes the words "in accordance with their respective Constitutions" in Article V to mean that the present Convention, or any provision thereof, shall become effective as the domestic

law of the United States only through legislation which would be valid in the absence of the Convention.

2. That the United States ratifies this Convention subject to the condition that the United States shall not thereby obligate itself to any act or omission prohibited by the United States Constitution, including but not limited to the enactment of legislation prohibited by the Constitution, and the subjection or surrender of any person to the risk of any process or punishment that would violate the Constitution if it were imposed by the United States.

Answer. A reservation or understanding included in the U.S. instrument of ratification of the Genocide Convention would be deposited with the Secretary General of the United Nations. The Secretary General would circulate the instrument to other countries for their information. Countries would be entitled to regard the conditions as reservations. If they did so, they would be free to comment on those reservations. For the second statement presented in the question, such comments could include interpretation by other countries of the U.S. Constitution.

Under our system of government the Supreme Court has ultimate responsibility for interpreting the Constitution of the United States. Circulating the second provision proposed by Senator Helms would give other parties the opportunity to perform this function—at least to a limited extent. Other countries could certainly express the view that enactment of implementing legislation was valid in the absence of the Convention or was not prohibited by the Constitution. Under traditional international law it would have been thought incompatible with the sovereignty of a state for other states to interpret its constitution.

In the Administration's view the interpretation of the U.S. Constitution is a domestic matter. It is not prepared to cede any competence in this respect to other countries.

With respect to the first text set out in your question, the Administration believes it is unnecessary in view of the declaration which the Administration has offered specifying that the President will not deposit the United States' instrument of ratification for the Convention until after Congress has enacted the domestic implementing legislation required by Article V of the Convention. In light of Congress' power under Article I, Section 8, clause 10 of the Convention to define and punish genocide as an "offense against the law of nations," the United States' ratification of the Genocide Convention would not in any way augment Congress' power to legislate with respect to genocide. Nor, in light of that power, would the first Helms understanding serve in any way to limit or restrain Congress' power to legislate with respect to genocide. The Congress has the power under the necessary and proper clause to enact legislation necessary to implement a valid treaty. See *Missouri* v. *Holland*, 252 U.S. 415, 432 (1920).

As noted above, the second of the texts set out in your question would afford other states an opportunity to interpret our Constitution in defining the scope of our international obligations.

STATE AND JUSTICE DEPARTMENT'S RESPONSES TO ADDITIONAL QUESTIONS SUBMITTED BY SENATOR KERRY

Question 1. Would attaching a reservation to Article 9 of the Genocide Treaty prevent the United States from bringing charges in the International Court of Justice?

Answer. Not necessarily. The language of its Article IX reservation would determine whether a party could institute proceedings under the Convention. To the extent that a State does not agree to be bound by Article IX, it could not rely on that Article in order to institute proceedings against another State party to the Genocide Convention.

Question 2. Would attaching a reservation to Article 9 permit nations such as the Netherlands and the United Kingdom to refuse to recognize U.S. ratification as valid on the ground that they had already taken this position in response to a similar reservation by the Soviet Union?

Answer. A U.S. reservation to Article IX would be circulated to all Contracting Parties. If any party wished to object, it would be entitled to do so. The effect of these objections would depend upon the statement of the objecting party.

For example, the Netherlands has objected to reservations in respect to Article IX as "incompatible with the object and purpose of the Convention." In addition, the Netherlands has taken the position that it does not deem any state making such a reservation to be a party to the Convention. The United Kingdom has stated that a reservation to Article IX "is not the kind of reservation which intending parties to the Convention have the right to make." The United Kingdom, however, has not

stated that it refused to recognize the ratification of a state entering such a reservation.

Question 3. Is attaching a reservation to Article 9 of the Treaty necessary to protect the constitutional rights of U.S. citizens?

Answer. Article IX of the Genocide Convention does not confer jurisdiction on the International Court of Justice to try an individual for genocide. Thus, there would be no possibility of trials of U.S. citizens before the International Court of Justice.

Question 4. Is attaching a reservation to Article 9 of the Treaty necessary to prevent American citizens from being tried before an international penal tribunal?

Answer. No. Article VI of the Genocide Convention indicates that an international penal tribunal would have jurisdiction over persons charged with genocide only "with respect to those Contracting Parties which shall have accepted its jurisdiction." It would be necessary for the United States subsequently and specifically to accept the jurisdiction of any international penal tribunal which may be established before American nationals could be subject to its jurisdiction. We would note that the concept of an international penal tribunal is not under active consideration in any international forum, and there has been no apparent interest in such tribunal for more than 30 years.

Question 5. Are there any constitutional conflicts posed by the Treaty, qualified by President Reagan's understandings and declaration?

Answer. No.

Question 6. Would ratification of the treaty by the United States cause citizens of the United States to be tried in forum countries in forums without the constitutional safefguards afforded by our judicial system?

Answer. Ratification of the Genocide Convention cannot "cause" U.S. citizens to be tried anywhere, whether in the United States or abroad. In ratifying the Convention, however, the United States would assume the obligation to enact domestic legislation making genocide a crime under U.S. law, and the United States would agree that genocide could not be regarded as a political offense for the purpose of extradition.

If genocide were a crime in the United States and an extraditable offense under a treaty between the United States and another State, that State could seek the extradition from the United States of any person, including a U.S. citizen, who had been accused of genocide in the foreign country. Like all other extradition requests, the State requesting extradition would have to produce sufficient evidence to persuade both a U.S. court and the Secretary of State that there was probable cause to believe the person sought committed the offense with which he was charged. Even then, however, since the United States would have made clear by ratifying the Genocide Convention with the third understanding recommended by the SFRC in 1984 its right to bring its nationals to trail before its own courts for acts of genocide committed outside the United States, we might seek to prosecute in the United States in accordance with our own implementing legislation, rather than extradite.

No other country provides constitutional safeguards identical to those afforded by our judicial system. Before concluding an extradition treaty with another State, however, the United States first ascertains that the foreign legal system in question is one that provides appropriate safeguards to warrant establishment of extradition relations with the United States.

Question 7. Would ratification of the treaty in any way protect U.S. citizens charged with the crime of genocide by another country which is a signatory of the treaty?

Answer. A U.S. citizen who is charged with and arrested in a foreign country for the crime of genocide would be subject to criminal proceedings in that country in accordance with its domestic law. U.S. ratification of the Convention would not alter that basic situation.

However, it is possible that the United States, as a party to the Genocide Convention, could, in such a situation, prevail upon the foreign country to extradite the U.S. citizens to the United States for trial here on the genocide charges. This would, of course, depend on a number of factors, such as whether an extradition treaty was in force between us (if a treaty were required by the foreign state in order to effect extradition), whether genocide was an extraditable offense under the treaty, whether the United States had jurisdiction to bring the accused to trial for the offense, and, generally, whether we could persuade the foreign country that justice would be served by allowing the trial to take place in the United States.

Ratification of the Genocide Convention would not reduce the protections available to U.S. citizens in the United States who might be accused of acts abroad. See answer to Senator Kerry's sixth question.

[Whereupon, at 5:17 p.m., the committee adjourned, subject to call of the Chair.]

APPENDIX

STATE OF CALIFORNIA,
GOVERNOR'S OFFICE,
Sacramento, March 8, 1985.

Hon. RICHARD G. LUGAR,
Chairman, Senate Foreign Relations Committee, 306 Senate Hart Office Building Washington, DC.

DEAR SENATOR LUGAR: I am writing to once again strongly urge the Senate of the United States to ratify the Convention on the Prevention and Punishment of the Crime of Genocide.

During the 36 years which have passed since the United Nations General Assembly adopted this treaty, 96 nations have ratified it. I find it hard to believe that our nation has not taken a strong stand against other nations who would commit the heinous crime of extermination of an entire people.

The atrocities committed against the Armenian people during World War I by Ottoman Turks, against the Jewish people by the Nazis during World War II and against the Cambodian people in the 1970's must never be forgotten, ignored or repeated.

I urge you to use your good offices to put the United States on the side of the 96 nations which now consider genocide an international crime and have dedicated themselves to prevent a recurrence of crimes against all of humanity.

Most cordially,

GEORGE DUEKMEJIAN.

FEBRUARY 28, 1985.

Hon. RICHARD G. LUGAR,
Chairman, Senate Foreign Relations Committee,
U.S. Senate, Washington, DC.

MY DEAR MR. CHAIRMAN: I thank you for your most cordial invitation to appear and testify before the Committee on Foreign Relations on Tuesday, March 5, on the Convention on the Prevention and Punishment of the Crime of Genocide.

As you undoubtedly know, I have testified before your Committee on this important subject on several past occasions.

My testimony is a matter of record and is, therefore, readily available to the Committee.

I regret very much, however, that on this occasion, I will not be able to appear in person and repeat my testimony.

I should like you to know, however, that I stand by my prior testimony and continue to be a firm supporter of the Genocide Convention, which I regard to be of great importance.

With every good wish, I am

Sincerely yours,

ARTHUR J. GOLDBERG.

NATIONAL JEWISH COMMUNITY RELATIONS
ADVISORY COUNCIL,
New York, NY, March 4, 1985.

Hon. RICHARD G. LUGAR,
Chairman, Senate Foreign Relations Committee,
SD 419 Dirksen Building Washington, DC.

DEAR SENATOR LUGAR: The National Jewish Community Relations Advisory Council, the national coordinating body for the field of Jewish community relations, urges the Senate Foreign Relations Committee to recommend the ratification of the Genocide Treaty by the United States Senate. Such an action by the United States is long overdue.

The NJCRAC is comprised of 11 national and 113 local Jewish community relations councils throughout the United States (listed on the reverse side of this letterhead). We call to your attention testimony submitted to the Senate Foreign Relations Committee by several of our national member agencies with which we are in full concurrence, namely, joint presentations of the Anti-Defamation League and the American Jewish Committee, and separate presentations of the B'nai B'rith and the American Jewish Congress. We are confident that the views we are all expressing reflect those of the American Jewish community.

Since the Treaty was drafted 36 years ago, more than 90 nations have ratified it. The United States is the conspicuous exception. for our country to continue to fail to ratify this fundamental human-rights treaty is grossly inconsistent with our leadership in the free world and our advocacy of human rights. This failure totally distorts the United States' abhorrence of genocide. As President Reagan asserted in calling for ratification, the United States should "use the Convention in our efforts to expand human freedom and fight human rights abuses around the world."

Ratification would be in the spirit and letter of the Constitution. As Attorney General Smith asserted on September 18, "there are no domestic legal obstacles to ratification of the Convention." This legal position is also maintained by the American Bar Association, and we concur with these judgments.

We look forward to swift action by the Senate Foreign Relations Committee so that, finally, after these many years, the United States Senate will give its consent to U.S. ratification of the Genocide Treaty. We respectfully request that this letter be included in the record of the hearings of the Senate Foreign Relations Committee.

Sincerely,

JACQUELINE K. LEVINE,
Chair, NJCRAC.

STATEMENT OF THE AMERICAN JEWISH COMMITTEE AND ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

In 1948, the U.N. General Assembly, having affirmed unanimously that "genocide" is a crime under international law, adopted the Genocide Convention. Soon thereafter, President Truman forwarded the Convention to the Senate with the request that it consent to ratification. Nearly every U.S. President since has reiterated this request, and in 1971 the full Foreign Relations Committee recommended ratification.

After the terrible Nazi crimes committed against Jews and others, the mass slayings of Chinese in Indonesia, Ibos in Nigeria, Buddhists in Cambodia and others on grounds of their race or religion, can anyone doubt that genocide is and should be a matter of international concern and an appropriate subject for the exercise by the United States of the Constitution's treaty-making power?

Law journal articles, Congressional reports and other writings abound which analyze minutely, and refute, arguments by opponents of ratification regarding particular clauses or terms in the Convention, such as "in whole or in part," "mental harm," "direct public incitement to commit genocide." It is unnecessary to repeat the answers, which have been doubly clarified and disposed of by the Foreign Relations Committee's recommendation in 1971 confirming the generally understood meanings.

Also laid to rest is the concern expressed about Article VII of the Convention, providing for extradition by Contracting Parties "in accordance with their laws and treaties in force." The objection raised at last week's hearing of the Judiciary's Subcommittee on the Constitution is that ratification might obligate the United States to extradite visiting Israelis on trumped-up charges of genocide; therefore, it is argued, Israel's friends in the United States should join in opposing U.S. ratifica-

tion. We would point out that Israel, one of first parties to the Convention, having ratified it in 1950 without any reservation, has recently expressed the hope that the Convention will gain universal acceptance.

Furthermore, it is U.S. practice not to grant extradition unless the requesting state establishes a *prima facie* case against the accused and unless we are confident that the requesting state will afford him a fair trial by the high standards of the U.S. Constitution, as interpreted by our highest Court. To make such a case, the requesting state would have to provide credible evidence of genocidal conduct within the terms of the Convention, including intent. In short, our government is fully capable of protecting its own citizens as well as allies and friendly nations from spurious extradition requests.

Nor need we be concerned about our country's ability to protect itself against an attempt by an adversary, such as a communist bloc state, to misuse the World Court to charge us falsely with genocide. Not the least reason is the reservations of all members of the communist bloc to Article IX, conditioning the Court's acceptance of jurisdiction on the volunteered consent of those states By these reservations, they lack the standing to bring us before the Court without our consent.

The Soviet Union and other unfriendly governments often respond to our criticism of their human rights practices by accusing us in their propaganda of hypocrisy, evidenced by our failure to ratify the Convention to which the large majority of countries—96—are Parties. This failure, they charge, has the purpose of "covering-up" our own misdeeds. Though most are not taken in by this ploy, surely it is in our interest to deprive our adversaries of it.

Our country's national interest mandates ratification of the Genocide Convention. Not only will this put us in a better position to protest acts of genocide in other lands, but it will deprive our enemies of a ground for challenging our commitment to human rights. Most important, adherence to the Convention will contribute to the goal and process of building an international legal order based on respect for the sanctity of human life.

It is inconceivable that the Senate should further delay undertaking an international commitment against mass murder. As our organizations have done repeatedly since the Convention was opened for ratification 37 years ago, we call on the Senate to give its consent to ratification.

STATEMENT OF THE AMERICAN JEWISH CONGRESS

The American Jewish Congress is a national organization of American Jews founded in 1918 and concerned with the preservation of the security and constitutional rights of American Jews through preservation of the rights of all Americans.

We are deeply concerned about the non-ratification of the Genocide Convention by the United States. It is ironic and deeply disappointing that our country, which played the leading role in drafting and adopting the Convention 3½ decades ago, should now be the only major country in the world that has failed to ratify it.

Our refusal to ratify the Genocide Convention is glaringly inconsistent with the positions we have taken on human rights, and undermines our efforts to ensure and promote their implementation around the world. How can we persuade other nations to heed our calls for respecting human rights in their countries when we ourselves seemingly refuse to accept the most fundamental human right of all—that of not being annihilated as a nation?

When President Truman transmitted the Genocide Convention to the Senate on June 16, 1949, he lauded it as "one of the important achievements of the General Assembly's first session." The role of the United States as a great moral force in bolstering the rule of law by support of the Genocide Convention was underscored in testimony to a subcommittee of the Senate Foreign Relations Committee early in 1950. Dean Rusk at that time said that ratification of the Genocide Treaty was essential to "demonstrate to the world that the United States is determined to maintain its moral leadership in international affairs and to participate in the development of international law on the basis of human justice."

What American leadership contributed through active participation in the drafting and the promotion of the Genocide Convention at the first session of the General Assembly has now won widespread international acceptance. Ratification by 97 nations eloquently testifies to the broad impact this treaty has had in the field of international law. We should hesitate no longer to adhere to a convention which we so vigorously espoused.

Our failure to act on the repeated expressions of endorsement by virtually all administrations during the last 35 years seems utterly perverse in light of the strict

manner in which the Convention's terms were drafted and the care that has been taken to ensure that it does not invade rights guaranteed to all U.S. citizens under the constitution. It is because of this scrupulous regard for constitutional rights that the American Bar Association, which at one time was opposed to ratification, is now in the forefront of its supporters. As stated by ABA President John C. Shepard last September, "We urge with . . . fervor the U.S. Senate to give its prompt advice and consent to ratification."

As is well known, the Genocide Convention is not self-executing. Any implementing legislation would be in accordance with our domestic procedure, and would, therefore, be subject to all the safeguards provided in the Constitution, including the substantive guarantees in the First Amendment and the procedural guarantees in the Fourth, Fifth, Sixth, Seventh and Eighth Amendments. Needless to say, acts of Genocide are already punishable under Federal as well as State law, and therefore implementing legislation would not create criminal liability where it does not now exist.

The Convention has been strictly drawn to require specific intent to commit genocide. Therefore, it does not apply, as some have suggested, to racial discrimination, to segregation, or to American military operations overseas. These objections were carefully examined by the Report of the ABA's Section of Individual Rights and Responsibilities and were dismissed as "not meritorious."

It should be clearly understood that Americans abroad are normally subject to local criminal law. If a foreign sovereign includes genocide among the crimes which it condemns, then Americans can be accused of committing it there, even if neither the United States nor the other country is a party to the Convention. Our ratification would not make Americans any more subject to foreign persecution for genocide than they already are.

Moreover, our laws forbid extradition in the absence of an extradition agreement between the foreign government and ourselves. We have no such agreement, for example, with Vietnam. Article VII of the Convention requires extradition for genocide only in accordance with "laws and treaties in force."

Attempts have been made to substitute for U.S. ratification of the Genocide Convention a non-binding Sense of the Senate Resolution to condemn genocide. We firmly believe that if adopted, this measure would only aggravate the harm already done by our deplorable failure to rectify the Convention for so many years. It would signal to the world that the United States lacks the courage to enter a binding commitment against genocide and is instead taking refuge in a non-binding, half-hearted measure. Ratification of the Convention now is imperative to redeem and restore faith in our frequently expressed concern for human rights. For the sake of our moral standing and our country's ability to protest against gross human rights abuses around the world, we must ratify the Genocide Convention now.

STATEMENT OF GERALD KRAFT, PRESIDENT OF B'NAI B'RITH

Human rights has been central to American foreign policy concerns since the beginning of the Republic. America's role as a beacon for the advancement of freedom and individual dignity around the world was and remains at the heart of its vision of itself and its purpose.

It is to one aspect of that purpose that I, as President of B'nai B'rith, the oldest and largest Jewish organization in the world, wish to address myself. Since the adoption of the United Nations Charter with its provisions promoting international human rights, B'nai B'rith has been in the forefront of efforts to advance those rights through appropriate and effective declarations and conventions or treaties.

One particular treaty has absorbed B'nai B'rith's interest and concern and, indeed, was at the core of our nation's human rights policy at the time the United Nations was created. That treaty is the Convention on the Prevention and Punishment of the Crime of Genocide. Adopted unanimously on December 9, 1948, it was the first international human rights accord established by the United Nations.

The objective of the treaty reflected, at the time, the very purpose of the international community. That was to prevent a recurrence of the Nazi horror that was perpetrated against Jews and others. For this reason the United States, in keeping with its traditional position, played the leading role in the adoption of the treaty, just as it performed a vital part in the adoption on December 10, 1948 of the Universal Declaration of Human Rights.

We profoundly regret that in the 36 years since the U.N. adopted it, the United States has yet to ratify this most fundamental and elemental of human rights treaties. We strongly urge the Senate to hesitate no longer and move quickly toward

ratification. We take note, with appreciation, that President Ronald Reagan, endorsed the Genocide Convention on the eve of his address to the B'nai B'rith Convention in September 1984. The President said at that time:

"Anyone who has contemplated the horror inflicted on Jews during World War II, the deaths of millions in Cambodia or the travail of the Miskito Indians in Nicaragua must understand that if free men and women remain silent in the face of oppression, we risk the destruction of entire people . . . With a cautious view, in part due to the human rights abuses performed by some nations that have already ratified the documents, our administration has conducted a long and exhaustive study of the [Genocide] Convention. And yesterday, as a result of that review, we announced that we will vigorously support, consistent with the United States Constitution, the ratification of the Genocide Convention. And I want you to know that we intend to use the Convention in our efforts to expand human freedom and fight human rights abuses around the world. Like you, I say in forthright voice, 'Never again!.' "

Many Americans have forgotten the crucial role America played at the birth of the Genocide treaty, a treaty designed to deter the destruction in whole or in part of an ethnic, racial or religious group. It would therefore be helpful to recall some background. It was the U.S. Administration and the American Ambassador to the United Nations who catalyzed international decision-making processes leading to the treaty's adoption. Anglo-American law was the principal source for the Convention. The legal formulations were couched in terms of traditional common law concepts long accepted in American jurisprudence.

Besides draftmanship, the U.S. delegation led the lobbying fight on behalf of the treaty. On the eve of the vote, the head of the delegation, Ernest A. Gross, told the delegates that the United States "is eager to see the Genocide Convention adopted at this session of the Assembly and signed by all member-states before we quit with our labors now." He eloquently explained why "positive action" is essential "before the memory of recent horrifying genocidal acts has faded from the minds and conscience of man."

Indeed, the United States was the first to sign the treaty—on December 11, 2 days after its approval. President Harry Truman transmitted it to the Senate 6 months later—on June 16, 1949. Testifying on behalf of the Administration before a Senate subcommittee in early 1950, Deputy Under Secretary of State Dean Rusk stated the fundamental American view. Ratification, he said, is essential to "demonstrate to the rest of the world that the United States is determined to maintain its moral leadership in international affairs."

The same theme has been articulated by every U.S. Administration in the last quarter of a century, whether Democratic or Republican. Indeed, as Senator William Proxmire has accurately noted, "there is not a single proposal that has been before the Senate as long" as the genocide treaty.

The harmful consequences of U.S. inaction are all too apparent, especially when one considers the number and character of contracting parties to the Convention. The treaty today has nearly 100 ratifying nations, including almost every major power, every NATO ally, and virtually every democracy in the world. The only principal hold-out is the United States, despite its decisive role in bringing the treaty into existence.

Our failure to ratify has marred America's image as the supreme champion of international human rights. The United States' moral authority as the major advocate of the oppressed everywhere is undercut as long as it continues to be a nonsignatory to the very first human rights treaty.

America's friends in the world find it difficult, indeed, impossible, to understand that American failure. One U.S. Ambassador to the United Nations observed in Senate testimony: "When I was United States Ambassador . . . I was often asked to explain our failure to ratify the Genocide Convention. Frankly, I never found a convincing answer. I doubt that anyone can." His perspective has been reflected in statements by our chief delegates in other international and regional forums.

The country most antithetical to international human rights—the U.S.S.R.—repeatedly exploits this American failure. Whenever the United States seeks to focus attention on Soviet transgressions in the area of human rights, the Soviet delegates point out that the United States has refused to associate itself with the treaty banning mass murder of minorities. The Soviet public, through Pravda, Izvestia, and Radio Moscow, hear annually that the United States has not ratified the Convention. Most recently, at the Madrid Conference (1980–83) of the Helsinki Final Act signatories, Soviet delegates took the occasion in sessions and in press conferences to make an issue of this.

Continued non-ratification is an obstacle to an effective U.S. role against current and future advocates or practitioners of genocide. Perhaps a dozen major instances of genocide have occurred (against, for example, Cambodians, Bengalis, Ibos, Hutus, and East Timorese natives) over the course of the past two decades. The United States could hardly be called upon to act on the basis that it was a contracting party to the treaty.

Finally, the United States, as the world leader in remembering and commemorating the trauma of the Holocaust, is hindered by the contradiction that it has not ratified the treaty designed to deter future holocausts. The official U.S. Holocaust Commission has urged ratification on the grounds that "the knowledge that perpetrators will be held responsible for the crime of genocide can play some role in preventing such acts in the future."

Assistant Secretary of State Elliot Abrams has put the issue before the United States today in succinct form. "We have all delayed too long," he said. U.S. ratification would "add America's moral and political prestige to this landmark in international law." B'nai B'rith and other likeminded organizations could only add that this deficiency in America's moral standing would be removed so that it might more effectively play its proper role as the principal champion of human rights internationally.

There are those who make the argument that if the United States ratifies the Genocide Convention, Israel may become the first target. We reject this as patently absurd. Israel is a signatory to the treaty and is not concerned with such specious charges.

Last October 11, the Senate took the historic and unprecedented step of voting overwhelmingly—87 to 2—for support of the principles of the Genocide Treaty. It pledged to act "expeditiously" for ratification at the new session in 1985. As interpreted by Senator Rudy Boschwitz, the Senate vote "commits us to early action in the next Congress."

B'nai B'rith urgently appeals to the Senate to act favorably now—to help deter future genocide, to commemorate the trauma of the Holocaust, and to enable the United States to be more effective in its role as the leading advocate of international human rights.

STATEMENT OF DAVID R. HAWK[1]

Many of the reasons for the United States to ratify the Convention on the Prevention and Punishment of the Crime of Genocide are well known and have been ably articulated by others. The purpose that lay behind President Truman's original signature to the Convention and the repeated, favorable consideration by the Senate Foreign Relations Committee has grown more pressing over the years during which the Convention has failed to achieve the advice and consent of the full Senate.

I appreciate this opportunity to emphasize the need for United States ratification of the Genocide Convention and the need for United States leadership in the promotion and protection of internationally recognized human rights.

Genocide is not only a problem of Hitler and Stalin's day. Acts of genocide are a terrible reality in our present day and age as well. The most important reason for the United States to ratify the Genocide Convention is that it will enable the United States to take action against the ultimate human rights violation—mass murder and other acts aimed at the total or partial destruction of a group of people because of their race, religion, ethnicity or nationality.

There are at least two close-at-hand situations in which the United States, were at a state-party to the Genocide Convention, could have and should have taken action against genocide under the terms and provisions of the Genocide Convention: Cambodia and Iran.

Some observers are only superficially aware of the structure and particulars of the massive violations in Cambodia after 1975. They recognize only the social destruction and physical liquidation of disfavored economic and political groups, groups unfortunately not included under the protection of the Genocide Convention. They have not realized that acts of genocide—according to the precise, narrowly in-

---

[1] David Hawk is an Associate of the Columbia University Center for the study of Human Rights and Director of the Cambodia Documentation Commission. An exhibit of his photographic documentation of the Cambodian genocide appeared in the Rotunda of the Russell Senate Office Building in May 1983. He was formerly Executive Director of Amnesty International USA.

terpreted terms of the Convention—were perpetrated in Cambodia under Khmer Rouge rule.

Between 1975 and 1979, the Communist Party of Kampuchea, having control of and operating in the name of the State of Democratic Kampuchea (as they had renamed Cambodia), committed clear-cut acts of genocide against Cambodia's pre-eminent religious group, the Buddhist monkhood, and against a racially distinct, ethnic minority group known as the Cham.

The Khmer Rouge had a fanatical hatred of religion. All religious practice was effectively and brutally prohibited. But this hatred fell most heavily on Buddhism, which was to Cambodia what Roman Catholicism is to Poland. Outside of the national and provincial capital cities (from which the people had been evacuated) the Buddhist temples that dotted the landscape of the Cambodian countryside were destroyed or converted into warehouses, workshops, prison and execution centers. Buddhist relics, statues and literature were destroyed or defaced. The eradication of the Buddhist religion required the dissolution and the liquidation of its clergy, considered by the Khmer Rouge to be a "feudal remnant." The Buddhist monkhood (Sanga) was a celibate, mendicant, teaching an contemplative religious order, readily recognized by their saffron robes and shaved heads. All monks were forcibly disrobed, the equivalent of defrocking or disbarment. The leadership of the Sanga and the most venerated of the monks were executed, as were those monks who refused to disrobe. Monks were sent to the fields and forced to undertake manual labor—something previously prohibited by the rules of the monkhood. Thousands died in the fields from exhaustion, starvation and disease. Before 1975 there were roughly 60,000 monks. A year after the Vietnamese invasion that ousted Pol Pot from power, less than one thousand survived and returned to the makeshift bamboo and thatch temples that the Cambodian people had built amidst the ruins or on the foundations of the Buddhist pagodas wholly or partially destroyed by the Khmer Rouge.

Not all of the former monks had been killed. Some of the disrobed monks had been forced to marry by the Khmer Rouge and are thus ineligible to return as monks. But unquestionably it was the intent of the Khmer Rouge to destroy the monkhood as a religious group. They succeeded, and even bragged about it. The official in charge of this, the "Minister of Culture," is the wife of the Khmer Rouge official who, on the central committee of the Communist Party of Kampuchea, was in charge of the infamous Tuol Sleng extermination camp and the nationwide prison-execution system for the liquidation of the revolution's suspected political enemies.

The Cham were a Malayo-Polynesian, religiously Muslim, ethnic minority group which had migrated into Cambodia after the 16th Century when the former Kingdom of Champa on the coast of central Vietnam had been conquered by the southern expansion of the Vietnamese. In Cambodia, the Cham had their own language, religion, dress and customs. The Khmer Rouge rigorously implemented a policy of "Khmerization." The Cham as a group were declared to no longer exist. Cham religious leaders were executed. Cham villages were broken up and the inhabitants dispersed among the general population. Cham dress, language, religion, custom—all the indices of the Cham ethnicity—were strictly and severely prohibited. The Cham resisted the forced assimilation, at which point Khmer Rouge policy and practice combined physical liquidation with legal prohibition and sociological dissolution. Khmer Rouge policy and practice toward other ethnic and national minorities—Chinese, Vietnamese, Thai, and Lao—may also have been genocidal but documentation on this is not available.

Further, considering the overall scale and proportion of deaths, a strong case can be made that the Khmer Rouge committed acts of genocide against the Cambodian "national" group itself. Between one-seventh and one-third of the Cambodian people died in 3½ years from executions, massacres and what the Genocide Convention (Article 11(c)) refers to as the "conditions of life" to which people were subjected—exhaustion from forced labor and forced marches, induced starvation and preventable disease. Resolution of that case depends, in part, on an interpretation of the Convention's "intent" clause.

More central to our present concern is the fact that in 1950 Cambodia had ratified the Genocide Convention without reservation. There were no legal or technical impediments to prevent the utilization of the review and remedy mechanism established by the Genocide Convention to take legal action against the Khmer Rouge genocide.

A complaint could have been made to the International Court of Justice (World Court) that Cambodia was in violation of its binding international legal obligations under the provisions of the Genocide Convention for

—failing to enact the necessary legislation to give effect to the provisions of the Genocide Convention;
—failing to *prevent* acts of genocide;
—committing acts prohibited by the Convention; and
—failing to punish those responsible "whether they are constitutionally responsible rulers, public officials or private individuals." (Article IV)

In 1977, President Carter proclaimed that the Khmer Rouge were "the worst violators of human rights in the world today." This statement was made in a telegram to a private, ad hoc Norwegian group that was holding public hearings on the situation in Cambodia. Obviously, there would have been far greater impact had such admirable and accurate sentiments been made in a complaint to the World Court under the terms and provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

There was very little international response to the Khmer Rouge genocide while it was happening. Why this was so is beyond the scope of the immediate inquiry. But it is a shameful story. One of the lessons of that failure is that there needs to be much more systematic monitoring of murder by government so that more prompt reaction is possible. It took 3 years and hundreds of thousands of deaths to even get Cambodia onto the agenda of the United Nations. Another lesson is the need to reassert the principle of accountability—established at Nuremberg and through the Genocide Convention—for governments that wantonly slaughter their citizenry. A third lesson should be that the leader of the Western democracies should ratify the Convention on the Prevention and Punishment of the Crime of Genocide so that the United States is in a position to take action to prevent or retard genocide.

I believe such a situation is presently at hand in regard to the treatment of the B'hai religious group in Khomeini's Iran. Iran, like Cambodia, is a state-party without reservation to the Genocide Convention.

There have been repeated executions of the B'hai elected leadership, the functional clergy in a religion of lay persons. There are legal prohibitions against the faith, numerous and varied acts of severe discrimination, and depression against individuals and families that will not renounce B'haism. It is evident that the Iranian authorities are intent on destroying what they regard as a heretical religious group. Minimally, Iran should be held accountable for failing to uphold its binding international legal obligations under the Convention to prevent genocide from occurring. Indeed it is before the death and destruction get as totally out of hand as happened in Cambodia that international action should be taken.

The Convention on the Prevention and Punishment of the Crime of Genocide is the symbolic and international legal embodiment of the commitment after the Holocaust and after Nuremberg that "never again" would the world sit idly by while dictators attempted the destruction of entire groups of people because of their race, religion, ethnicity or national origin. Symbols are important in national and international life. America should ratify the Convention to express that commitment. Further, it is important for the United States to correct the complications and misimpressions created by its failure to ratify.

But I believe the cases of Cambodia and Iran show that the Convention is, at least potentially, more than a symbol. U.S. ratification creates the possibility that pursuant to the deeply held values and convictions of the American people, the United States Government can take action against regimes that commit genocide or fail to prevent it.

The Genocide Convention is sometimes criticized for failing to include in the definition of genocide the partial or total destruction of political groups, covering only ethnic, racial, religious, and national groups. This criticism has merit. Provisions for political groups should have been retained in the final language of the Convention. But this does not demonstrate the lack of potential utility for the Genocide Convention. Racial, ethnic, religious, and national minority groups sometimes face discrimination even under the best legal, political and social systems. Under the terrible social, political, and legal systems brought about by dictatorial regimes, discrimination sometimes becomes so severe as to threaten the very existence of minority groups. Indeed, it is rare that situations of severe repression and mass murder by government do not include scapegoating of racial, religions, ethnic, and national minorities. As we have seen such scapegoating can reach genocidal proportions. Once could also examine the tribal, that is, ethnic minority, composition of Idi Amin's repression in Uganda or the treatment of indigenous, that is, Indian, minority populations in Central America in this light. The failure of the Genocide Convention to include political groups is indeed unfortunate, but it does not follow that the Genocide Convention has, therefore, no potential utility or applicability.

It is also sometimes argued that because genocides have occurred after the Genocide Convention took effect, the Convention is of little value or utility, not because there are no concrete situations to which it applies, but because it has not stopped genocide. This conclusion, too, is misleading. International human rights laws in and of themselves do not stop human rights violations any more than domestic laws against homicide and theft stop murder and robbery, even with the vastly more potent powers of enforcement available. Yet, few, if any, would argue that the social community need not have laws against homicide.

The deterrent value of any law is obviously related to, among other things, its enforcement or utilization. The deterrent value of international human rights law in a world of sovereign states is similarly related to the measures of review and redress that enable international public opinion, the international community itself, and other nation—states (bilaterally and multilaterally) to bring ameliorative and corrective pressure to bear on regimes that violate the global standards of governmental conduct established in the human rights agreements.

This is obviously no utopian be-all and end-all. On the other hand, it is the victims and survivors of terrible repressions, far more than lawyers, political theorists or social scientists, who eloquently and constantly plead the need and importance of international human rights standards and machinery for their implementation and review. When their own governments brutally repress them, what other recourse do they have?

The provisions of the Genocide Convention have never been formally utilized to bring international or diplomatic legal pressure to bear on regimes that fail to prevent genocide or perpetrate it. This is indeed regretable. But the most valid conclusion that may be warranted from this unfortunate situation is that the international human rights protection system envisioned and established by the Genocide Convention has not, and may not, work without involvement of the world's strongest democracy and leading proponent of human rights.

United States involvement and participation is certainly no automatic or magic solution either. But what, one can ask, would have happened at Nuremberg, or the Madrid Review of the Helsinki Accords if the United States had not been involved. The sorry record of non-utilization of the Genocide Convention indicates that the Convention has to be strengthened as a global standard and that stronger leadership is necessary to initiate the review provisions where possible and when necessary. Without U.S. ratification, the Genocide Convention simply is not in real terms a global standard. The effective implementation of the international human rights machinery is as much a question of international will as it is a matter of fact or law. The potential for constructive United States leadership in mobilizing the international will to take action against genocide is obvious.

The ability of the United States to take action against states committing genocide or failing to prevent it, would of course be severely diminished if the U.S. ratification of the Genocide Convention is accompanied by a "Soviet" or "India" type reservation to Article IX which extends jurisdiction to the World Court, the review mechanism provided for in the Convention. Such a reservation would contradict President Reagan's pledge last September that his administration intended to use U.S. ratification of the anti-Genocide Convention "in our efforts to expand human freedom and fight human rights abuse around the world." A crippling reservation to Article IX would enable the United States to do no such thing.

Crippling reservations to Article IX—refusing to extend jurisdiction to the World Court to consider a complaint regarding genocide—were initiated by the Soviet Union for reasons that may be readily surmised. Their Article IX reservation was adopted by other members of the Soviet bloc. This kind of reservation was formally objected to by some of our sister democracies which have ratified the Convention, and was the subject of one of the World Court's less decisive Advisory Opinions.

Subsequently, India adopted a more clever Article IX reservation accomplishing the same effect as the Soviet reservation but with the primary virtue of appearing not to be entirely within the Soviet bloc. An India-type reservation would require the consent of the State committing genocide before the World Court could hear a complaint against that genocide. The likelihood of a genocidal state ever agreeing to World Court consideration can be gauged from the crudely vituperative response by the Khmer Rouge to the mere, and politely worded, notification by the U.N. Human Rights Commission, that it had received allegations of misconduct. Several of our democratic allies have also entered formal objections to India's Article IX reservation.

The question of gutting reservation to Article IX was not raised in November 1984 when the Administration determined to press for U.S. ratification. A reservation that effectively precludes taking legal action against a genocidal regime is, it needs

to be said again, contradictory to President Reagan's pledge to use U.S. ratification of the Genocide Convention "in our efforts to expand human freedom and fight human rights abuse around the world."

What has happened in the interim is the U.S. boycott of the World Court over the Nicaragua matter. But what is at issue regarding U.S. ratification of the Genocide Convention is not the wisdom of the World Court's accepting jurisdiction on the Nicaragua claim or the U.S. response to that action, but the wisdom of extending a particular response to a particular situation into a more general proposition and transferring that proposition from the realm of national security to the field of human rights. Given the hostile nature of the international environment, U.S. national security policies are inevitably controversial. Sometimes even the support of our allies is reluctant. On the other hand, U.S. human rights policy is strongly supported by the American people, is widely appreciated by the peoples of the world, and other nation-state—except, of course, for those states which are the well-deserved objects of official criticism.

A Soviet- or India-type reservation to the Genocide Convention is a misdirected response to the Nicaragua situation. Denying the United States the potential for taking action against genocide before the Court does not punish the Court, which has never evidenced any great desire to tackle the problem of genocide. A Soviet- or India-type reservation will succeed primarily to give genocidal regimes a veto power over potential U.S. action.

That the United States requires protection against accusations of perpetuating acts proscribed by the Genocide Convention defies both reality and common sense. In a world where there are those who would even deny the historical reality of the Holocaust, it is to be expected that there are those who label all sorts of things genocide which are not. What is disconcerting is that the U.S. Senate should give consideration to such baseless ruminations. The question is less whether the Genocide Convention will be used frivolously or mischievously. That hypothetical possibility has existed for a long time and will continue to exist irrespective of U.S. reservation to Article IX. The issue is whether without constructive U.S. influence the Genocide Convention will be used at all.

What is not hypothetical or speculative is that nation states have committed genocide, and that action needs to be taken against these situations. The choice is between imperfect protection against implausible, mischievous use of the Convention against the United States or the ability of the United States to initiate action against real situations of genocide (or failure of a nation-state to uphold its treaty obligations to prevent genocide). Endless amounts of time can be devoted to speculating about the hypotheticals. Weighed against this should be a realistic and common sense look at what kind of regimes have committed genocide and what should be done about it.

In considering an Article IX reservation, care should also be given to the example the United States will set for others if the Senate passes a human rights convention as a symbolic gesture, while simultaneously gutting the implementation review procedures.

Review procedures are to human rights agreements what verification is to arms control. In the global human rights arena, it is usually the Soviets who reluctantly accept international standards, but attempt to weaken, water-down or preclude themselves from the machinery for review and redress. In the various fora where international human rights agreements are drafted, American diplomats work to resist the eviseration of review provisions and procedures. In the particular cases of the Genocide Convention, our allies have formally objected to reservations precluding review procedures.

The United States is the leader of the world's democracies and a country where successive Congresses and Administrations have proclaimed human rights to be at the core of our values, our concerns and our policies. Other countries, lacking standards are thusly more important, have citied the U.S. failure to ratify human rights agreements as an excuse for their own unwillingness to do so. For the United States, which is surely among those nation states that has least to fear from potential review, to adopt the treaty as a symbolic gesture while accompanying ratification with a reservation that precludes review, sends exactly the wrong message.

What is far more likely than for the United States to get hauled before the World Court on a bogus genocide charge is for other countries to follow our lead and symbolically ratify human rights agreements while precluding measures of remedy, review and redress. Should this happen, U.S. ratification of the Genocide Convention with a crippling Article IX reservation could even be a disservice to the cause of promoting and protecting human rights. In considering ratification of the Genocide Convention and resolving the Article IX question, I hope Senators will consider

the problem as mass murder by governments in the realistic perspective it deserves and ratify the Genocide Convention in such a way as to enable the United States to take international action to deter, prevent and retard genocide.

Statement of the Armenian National Committee of America

The Genocide Convention and the U.S.—An Armenian-American Perspective

"The "Age of Genocide" began early in this twentieth century when 1.5 million Armenians were annihilated by the Turkish Government of 1915. It reached its gruesome climax in the Nazi Holocaust of six million Jews and the mass murder of countless Gypsies, Russians, Poles, and others by Adolph Hitler, who in August, 1939, asked cynically: "Who still talks nowadays of the extermination of the Armenians?"

The Armenian National Committee of America believes that the best answer to Hitler's still-chilling and unfortunately still-pertinent question would be a world united its outlawing of *genocide*, i.e. killing and other actions taken "with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group." The United States cannot remain outside such a compact.

Let us answer Hitler by seeing to it that the Genocide Convention is finally ratified by the United States and that the United States provides the leadership, in the U.N. and elsewhere, to assure that the Genocide Convention becomes more than a statement of principle and that the actions necessary to establish the procedures and structures (including a Tribunal) to implement the Convention are taken as soon as possible. Almost 40 years have passed since the U.N. first enacted the Genocide Convention.

Since President Truman first signed the Treaty, seven Presidents, most recently President Reagan, have publicly supported and urged U.S. ratification of the Genocide Convention. While we welcome these hearings, we are deeply concerned about reports that the U.S. Senate might consider supporting ratification only if it is subject to a condition that stipulates that the U.S. does not consider itself subject to the jurisdiction of the International Court of Justice in cases where violations of Genocide Convention are at issue, thereby arrogantly excluding ourselves from accountability.

Of all nations, the United States has the least to fear, not because its history has been unblemished but because it has been willing to confront and deal with its past problems, ranging from slavery to the treatment of American Indian to the internment of Japanese-Americans. Indeed, it is one of the great ironies of recent times that, while the United States has still not ratified the international Convention (Treaty) on the Prevention and Punishment of Genocide, Turkey has nominally done so.

The irony lies in the fact that in this century alone, over two million people have been victims of Turkish-perpetrated Genocide. In fact, the wholesale government-planned massacre of over one and half million and the deportation of another million Armenians by the Turks during 1915—and the fact that the Turkish nation has gone unrepentent and never held accountable—led directly to the idea of the Genocide Convention.

When in 1921 a young Armenian was tried by a German court for the Berlin assassination of Talaat Pasha, the Turkish Minister of the Interior who ordered the 1915 massacres, a young Jewish student named Rafael Lemkin was appalled by the realization that the assassination of a mass-murderer was a crime, but mass murder was not. He was eventually to coin the word "Genocide," and after three decades of effort (during which time his own people experienced the Nazi Holocaust) Lemkin became the author of the Genocide Convention.

Professor Lemkin frequently cited the Armenian Massacres of 1915 as a clear case of Genocide which perceded the adoption of the Convention, as did the Holocaust perpetrated by Germany.

The many parallels and similarities between this century's two classic examples of Genocide are almost overshadowed by the fact that, in sharp contrast to Germany's acknowledgement of guilt and its reparations programs, the current government of the Republic of Turkey is engaged in a massive campaign of denial and distortion, as exemplified by the well-financed efforts of Turkey's Ambassador to the U.S. to re-write history and by newspaper ads and publications of various front organizations and "institutes" which go so far as to describe the 1915 holocaust as a "myth." Turkish diplomats and their agents have actually attempted to block the construction of memorials to Armenian Genocide victims, even here in the United

States, and they have constantly pressured foreign governments, personalities, officials and the press not to participate in or report on Armenian Genocide commemorations. Most recently, Turkey has attempted to stop the U.S. Congress from adopting a simple resolution commemorating the Genocide.

Turkey's present intransigence and callous disregard for its crimes certainly has its roots in the fact that post-World War I Turkey was never held accountable for its crime and that, in fact, Turkey ended up with more Armenian territory than it held prior to the War—a virtual reward for its crimes—and the Armenians were forgotten, with the Lausanne Treaty symbolizing war-weary Europe's acceptance of genocide and dispersal as a de-facto "solution" to the Armenian Question.

The fact that the Turks were able to "get away with murder" during World War I encouraged the Nazis to undertake similar crimes in World War II. Even today, former Nazis continue to avoid prosecution and in recent years new attempts at genocide have been seen, particularly in Southeast Asia and Africa. In Turkey itself, the Kurdish people are today the victims of a genocidal campaign of physical and cultural oppression which much of the outside world chooses to ignore.

There is of course no guarantee that a fully-implemented Genocide Convention will break the cycle of mass murder, but it is essential that the effort be made and, clearly unqualified U.S. ratification is indispensable if this most important of human rights treaties is to have a chance to move from mere paper to a truly effective statement of international legal and moral principles and finally to a workable instrument for "the Prevention and Punishment of the Crime of Genocide.

We urge ratification by this great republic, this refuge for Armenian, Jewish, and other survivors of Genocide. We urge ratification without reservations that would weaken the Treaty and undermine America's leadership role in international human rights.

STATEMENT OF ROSS VARTIAN, EXECUTIVE DIRECTOR, ARMENIAN ASSEMBLY OF AMERICA

Mr. Chairman and members of the Committee: My name is Ross Vartian. I am Executive Director of the Armenian Assembly of America, a national non-profit organization that presents Armenian American community viewpoints within the legislative and executive branches of government. Mr. Chairman, Armenian-Americans throughout the country strongly support U.S. ratification of the Genocide Convention. We urge the Senate to give its advice and consent to this important document.

The Armenian Genocide of 1915–1923 was the first example of genocide in the 20th century. Indeed, many believe it to be the worst example of mass slaughter history had known up until that time. Our American Ambassador to Ottoman Turkey, Henry Morgenthau, Sr., stated:

I am confident that the whole history of the human race contains no such horrible episode as this. The great massacres and persecutions of the past seem almost insignificant when compared with the sufferings of the Armenian race in 1915.[1]

A factual summary of the Armenian Genocide was included by Senator Helms in his "Additional Views" appended to this Committee's report on the Genocide Convention of September 24, 1984. We thank Senator Helms for preparing this synopsis and request permission to insert it into the record.

Armenian-Americans point proudly to the fact that it was our own Ambassador Morgenthau that led the international outcry against the destruction that was taking place in Ottoman Turkey under the convenient cover of world war. Morgenthau, an American Jew who understood the parallel between earlier Jewish pogroms and the persecution of the Armenians, used every tool available to him, including secret diplomatic cables, personal entreaties to Ottoman leaders and their allied German counterparts, and appeals to the international public to bring the wholesale slaughters to a halt.

Mirroring Morgenthau's efforts, the then-allied governments of France, Great Britain, and Russia issued a declaration on May 24, 1915 denouncing the massacres of the Armenian population "as crimes against humanity and civilization for which all members of the Turkish government will be held responsible together with its agents implicated in the massacres."[2] These World War I American allies, like our

---

[1] Morgenthau, Henry, "Ambassador Morgenthau's Story" (Doubleday, Page & Co., 1919), pp. 321–22.

[2] Kuper, Leo, "Genocide" (Penguin Books, 1981), p. 20.

Ambassador Morgenthau, understood that the Ottoman government was committing a crime that the world had not yet encountered. While their phrase "crimes against humanity" was to be used later to describe the Nazi Holocaust, it was not until 1944 that the word "genocide" was coined by Professor Raphael Lemkin.

Lemkin, a lawyer who escaped Poland during the Nazi invasion of 1939, was the key figure in the history of making genocide a crime under international law. He lost 49 members of his own family in the Holocaust and worked tirelessly until his death in 1959 toward the adoption of the Genocide Convention.

Having been profoundly affected by the extermination of the Armenians in Ottoman Turkey in 1915, Lemkin first proposed "to declare the destruction of racial, religious, or social collectivities" an international crime at the International Conference on the Unification of Criminal Law held at Madrid in 1933 under the auspices of the League of Nations. Although at first rejected, his proposal gained new significance after the destruction of European Jewry in World War II and led to the drafting of the Genocide Convention by a United Nations committee in 1947–1948. In his decade-long effort to obtain ratification of the treaty, Lemkin repeatedly noted the Armenian atrocities, together with the Holocaust, as a prototype of the crime of genocide. I ask permission to insert into the record several of these illuminating quotations.

Governor George Deukmejian of California, the son of Armenian Genocide survivors, noted the contribution of Raphael Lemkin in a letter to this committee last year urging Senate advice and consent of the Genocide Convention. I ask permission that Governor Deukmejian's letter be inserted into the record at this time.

Professor Lemkin knew that the Armenians had been deprived of their own Nuremberg trials. He came to understand that this first genocide, having been left unchecked, provided encouragement to future perpetrators of genocide, including those who destroyed his own family. Adolf Hitler stated as early as 1931:

Are we really to remain a nation of have-nots forever? Why should not the sources of raw materials be equitably distributed? We have the capacity to rouse and lead the masses against this situation. . . . We intend to introduce a great resettlement policy; we do not wish to go on treading on each other's toes in Germany. . . . Think of the biblical deportations and massacres of the Middle Ages (Rosenberg refers to them) and remember the extermination of the Armenians. One eventually reaches the conclusion that masses of men are mere biological plasticine. We will not allow ourselves to be turned into niggers as the French tried to do in 1918. The nordic blood available in England, northern France and North America will eventually go with us to reorganise the world.[3]

Having recognized this progression of twentieth century genocide, Professor Lemkin dedicated himself to ensure that individuals such as Talaat, Enver, and Jemal—the Young Turk triumvirate—would never again be permitted to conduct the wholesale destruction of a people without accountability to the world.

Turkey today, although still engaged in a vast campaign to deny the Armenian Genocide of its predecessor regime, is nonetheless a signatory of the Genocide Convention, and in fact is one of the twenty original nations to adopt the treaty. Turkey, like Germany and other nations whose past regimes have been guilty of genocidal practices, has seen the value of joining in an international agreement against the crime of genocide. It is critical that the United States now do so as well.

As Governor Deukmejian has stated, the United States above all other nations stands for the rule of law, respect for human life, and the dignity of the individual. Armenian-Americans are convinced that if there had been a Genocide Convention in place in 1915, the mere existence of such an internationally-adopted document outlawing the crime being perpetrated in Ottoman Turkey may have dissuaded the Young Turks from completing their campaign. At a minimum, some of the 1.5 million victims might have been spared. That, in itself, is a consideration that *must* take precedence in any discussion about the merits of the Convention.

Let us give the future Henry Morgenthaus of this country the legal tool necessary to support their moral pleas for the humane treatment of subject peoples. In 1915, the United States led the international condemnation of the atrocities being committed against the Armenian people. Let us ratify the Genocide Convention now and demonstrate the same courage and determination to preserve human life from the worst crime mankind has ever known.

Thank you, Mr. Chairman, for the opportunity to present an Armenian-American community perspective on the Genocide Convention.

---

[3] Calic, Edouard, ed., "Secret Conversations with Hitler" (John Day Company, 1968), p. 81.

[From Senator Helms' "Additional Views," Sept. 24, 1984]

The Armenian case.—The Armenian nation was the object of a murderous policy of annihilation during the World War I era. While the fate and terrible sufferings of the Armenian nation were well known around the world during the early part of this century, today this tragic history is described by some Armenians as a "foreign genocide."

Armenians trace their heritage to the territories around the Caucasus mountains south to the Mediterranean coast of today's Syria. Armenia was first recognized as an ethnic entity in the 6th century B.C. Owing to the Apostles Thaddeus and Bartholomew who brought the Christian faith to Asia Minor and to the Patriot Saint, Gregory the Illuminator, Armenia became the first Christian nation.

The Armenian nation lost its political independence in the 14th century and became the subject of foreign and Islamic rulers. Even in the preceding millennium, Armenia's independence had always been precarious and, whether independent or subjugated, the Armenians had come to identify themselves solidly with their own Gregorian Church. This identification made them outsiders in an orthodox Christian Roman Empire, a Muslim Sunni Ottoman or Shiite Persian Empire, or an orthodox Russian Empire.

As early as the 17th century, Armenians appealed to European goodwill and intervention to remedy the sufferings of the Armenian nation in Muslim lands. In the 18th and 19th centuries, Roman Catholic as well as American protestant missionaries to the Armenians under Ottoman rule introduced Western national feeling and encouraged Armenians to develop their own study of native history, language, and other cultural affairs.

Repression of the Armenian nation became severe in 1894–1895 under the Ottoman ruler Sultan Abdul Hamid II. According to some accounts, as many as 300,000 Armenians lost their lives during this period which was a precurser to more horrible and widespread suffering which began in 1915.

In June of 1915, the Turkish government enacted a policy of forced deportation and relocation of Armenians to the desert regions of eastern Syria near the Euphrates. Between 1915–1917, over a million Armenians were forcibly taken from their homes in the eastern provinces and the coastal cities of Cilicia and made to relocate. The sufferings of the Armenian nation knew no limit and they became the objects of the first massive genocide of the twentieth century. In all, above one million souls perished in this holocaust.

The American Ambassador in Turkey, Ambassador Henry Morganthau recorded in his book his views of the Armenian genocide in a chapter entitled, "The Murder of a Nation." Ambassador Morganthau described the genocide policy in the following manner:

> As a matter in fact, the Turks never had the slightest idea of reestablishing the Armenians in this new country. They knew that the great majority would never reach their destination and that those who did would either die of thirst or starvation or be murdered by the wild Mohammedan desert tribes. The real purpose of the deportation was robbery and destruction; it really represented a new method of massacre. When the Turkish authorities gave the orders for these deportations, they were merely giving the death warrant to a whole race; they understood this well, and, in their conversations with me, they made no particular attempt to conceal the fact. . . . I am confident that the whole history of the human race contains no such horrible episode as this. The great massacres and persecutions of the past seem almost insignificant when compared with the sufferings of the Armenian race in 1915. The slaughter of the Albigenses in the early part of the thirteenth century has always been regarded as one of the most pitiful events in history. In these outbursts of fanaticism about 60,000 people were killed. In the massacre of St. Bartholomew about 30,000 human beings lost their lives. The Sicilian Vespers, which had always figured as one of the most fiendish outbursts of this kind, caused the destruction of 8,000. Volumes have been written about the Spanish Inquisition under Torquemada, yet in the eighteen years of his administration only a little more than 8,000 heretics were done to death. Perhaps the one event in history that most resembles the Armenian deportations was the expulsion of the Jews from Spain by Ferdinand and Isabella. According to Prescott 160,000 were uprooted from their homes and scattered broadcast over Africa and Europe. Yet all these previous persecutions seem almost trivial when we compare them with the sufferings of the Armenians, in which at least 600,000 people were destroyed and perhaps as many as 1,000,000. And these earlier massacres, when we compare them with the spirit that directed the Armenian

> atrocities, have one feature that we can almost describe as an excuse: they were the product of religious fanaticism and most of the men and women who instigated them sincerely believed they were devoutly serving their Maker. Undoubtedly religious fanaticism was an impelling motive with the Turkish and Kurdish rabble who slew Armenians as a service to Allah, but the men who really conceived the crime had no such motive. Practically all of them were atheists, with no more respect for Mohammedanism than for Christianity, and with them the one motive was cold-blooded, calculating state policy.

Such was the reaction in these United States, that Congress chartered an organization known as Near East Relief which contributed some $113 million from 1915 to 1930 to aid the Armenian genocide survivors. Some 132,000 orphans became foster children of Americans. The Foreign Relations Committee of the United States Senate held hearings on the Armenian tragedy and passed Senate Resolution 359 dated May 13, 1920. The resolution stated in part that

> . . . the testimony adduced at the hearings conducted by the subcommittee of the Senate Committee on Foreign Relations have clearly established the trust of the reported massacres and other atrocities from which the Armenian people have suffered.

Hon. CHARLES PERCY,
Committee on Foreign Relations, Dirksen Senate Office Building, Washington, DC.

DEAR MR. CHAIRMAN: I respectfully urge this committee and the United States Senate to act without further delay to ratify the Convention on the Prevention and Punishment of the Crime of Genocide.

The atrocities committee against the Armenian people during World War I by Ottoman Turks, against the Jewish people by the Nazis during World War II and against the Cambodian people in the 1970's must never be forgotten, ignored or repeated.

Ninety-six nations have ratified this treaty since it was adopted by the United Nations General Assembly on December 9, 1948. It is incomprehensible that the nation which above all others stands for the rule of law, respect for human life and the dignity of the individuals has not ratified it.

My parents came to this country because America provided the hope that they could live, work and raise their family in a community free from violence and lawlessness. Our country is far from perfect in this regard. Yet every day we are strengthening our commitment to public safety, and we are succeeding in getting more criminals off our streets. Surely, it also behooves us to take a stand against criminal nations who would commit wholesale murder and robbery against an entire people.

It would be most fitting for the United States Senate to rafity the Convention in 1984 which marks the 25th anniversary of the death of the treaty's principal author, Raphael Lemkin.

Lemkin, a Polish Jew, first took interest in the issue of the deliberate destruction of a people following the extermination of 1.5 million Armenians in Ottoman Turkey during World War I. Less than three decades later, Lemkin lost 49 of his own family members in the Nazi Holocaust. From the point on until his life ended in 1959, this courageous man worked tirelessly to make genocide an international crime.

We must dedicate ourselves to the ideal for which Raphael Lemkin persevered: the right of all people of the world to live and work and raise their children in peace and freedom. Ratification of the Genocide Convention will be a strong message of commitment by our freedom-loving nation to preserve basic human rights and to prevent a recurrence of this heinous crime against humanity.

Most cordially,

GEORGE DEUKMEJIAN.

QUOTATIONS BY RAPHAEL LEMKIN REGARDING THE ARMENIAN GENOCIDE

(1) From letter to Mrs. Thelma Stevens, Methodist Women's Council, July 26, 1950: "This Convention is a matter of conscience and is a test of our personal relationship to evil. I know it is very hot in July and August for work and planning, but without becoming sentimental or trying to use colorful speech, let us not forget that the heat of this month is less unbearable to us than the heat in the ovens of Ausch-

witz and Dachau and more lenient than the murderous heat in the desert of Aleppo which burned to death the bodies of hundreds of thousands of Christian Armenian victims of genocide in 1915."

(2) *Totally Unofficial*, the autobiography (unpublished) of Raphael Lemkin: (a) "In 1915, the Germans occupied the city of W. and the entire area. I used this time to read more history, to study and to watch whether national, religious or racial groups are being destroyed. The truth came out only after the war. In Turkey, more than 1,200,000 Armenians were put to death for no other reason than they were Christians . . . After the end of the war, some 150 Turkish war criminals were arrested and interned by the British Government on the island of Malta. The Armenians sent a delegation to the peace conference at Versailles. They were demanding justice. Then one day, the delegation read in the newspapers that all Turkish war criminals were released. I was shocked. A nation was killed and the guilty persons were set free. Why is a man punished when he kills another man? Why is the killing of a million a lesser crime than the killing of a single individual?". (p. 12)

(b) "I identified myself more and more with the sufferings of the victims, whose numbers grew, as I continued my study of history. I understood that the function of memory is not only to register past events, but to stimulate human conscience. Soon contemporary examples of Genocide followed, such as the slaughter of the Armenians in 1915. It became clear to me that the diversity of nations, religious groups and races is essential to civilization because every one of these groups has a mission to fulfill and a contribution to make in terms of culture . . . I decided to become a lawyer and work for the outlawing of Genocide and for its prevention through the cooperation of nations." (p. 2)

(c) ". . . A bold plan was formulated in my mind. This consisted [of] obtaining the ratification by Turkey among the first twenty founding nations. This would be an atonement for [the] genocide of the Armenians. But how could this be achieved? . . . The Turks are proud of their republican form of government and of progressive concepts, which helped them in replacing the rule of the Ottoman Empire. The genocide convention must be put within the framework of social and international progress. I knew however that in this conversation both sides will have to avoid speaking about one thing, although it would be constantly in their minds: the Armenians." (p. 32)

(Source: The Raphael Lemkin Papers, N.Y. Public Library)

STATEMENT OF A. CLIFFORD BARKER, CHAIRMAN, THE JOHN BIRCH SOCIETY, BELMONT, MA

There are a great many solid reasons why the Senate should never ratify the Genocide Convention. For one, every Senator knows that genocidal crime has been consistently practiced on grand scales by Communist regimes throughout the nearly three decades of its existence. Yet, even though all Communist nations have ratified the measure, none has ever been punished or even accused under its provisions. Not even Soviet Russia's current genocide against the people of Afghanistan can be brought before any tribunal under this Convention's aegis because the original language of the treaty was structured so as to exempt Communist nations. At best, the measure is a monstrous fraud.

What I wish to stress in this brief statement, however, on behalf of at least the tens of thousands of concerned Americans who are members of The John Birch Society, is that this treaty is far worse than a fraud. It is instead a gravely dangerous proposal whose ratification would constitute an important immersion of the United States into a sovereignty-eroding international order. Senate approval of this measure by a two-thirds vote would seriously compromise the independence of the United States. And I appreciate this opportunity to place into the record a brief synopsis of the reasons why this is so.

Under Article I of the Genocide Convention, numerous criminal acts heretofore considered to be crimes against the domestic laws of a nation are automatically converted into offenses against international law. Article V requires each signatory nation to enact legislation to deal with these new international crimes. And under Article IX, such legislation, as well as the interpretation, application or fulfillment of the provisions of the treaty, become subject to final review by the International Court of Justice of the United Nations upon request of any party involved in the matter. And no appeal process exists.

Article VI of the U.S. Constitution states that treaties "shall be the supreme law of the land." Should the Senate ratify this Convention, its self-executing provisions would immediately supersede all state laws inconsistent with them. Also, those self-

executing provisions would supersede all federal law and prior treaty law which might also be inconsistent with them. As is further obvious from reading the treaty's language, our nation would be obliged to enact an entirely new body of UN-approved federal law to deal with these newly defined international crimes. In short, treaty ratification would transfer jurisdiction—where genocide is claimed to be the motive for various alleged crimes—from the state courts to federal courts, and from federal courts to ultimate international authority. No other treaty in the history of our nation has ever included such far-reaching and dangerous consequences.

Ratification would, therefore, necessitate a fundamental and chaotic alteration in the method by which criminal justice has been administered in our nation from its founding. By virtue of this treaty, jurisdiction over numerous domestic crimes would pass from the state governments to the federal government, an enormous shift of power. But even more, Senate approval of this treaty would subordinate U.S. law to an international order under the Communist and Marxist-dominated United Nations.

Have the members of the Senate considered this consequence of ratification? Senators who have should immediately recognize that adherence to their oath of office to support and defend the Constitution of the United States demands a negative vote on the matter of ratification. Support for the Constitution and support for this treaty cannot be reconciled, even by adding reservations to it.

Senators who have not considered these consequences should waste no time in assessing the dangers I have so briefly outlined. For a more thorough and scholarly exposition of this entire matter, I respectfully refer each Senator to the testimony given by former Senator Sam Ervin (D.-N.C.) before the Senate Foreign Relations Committee on May 22, 1970. I was pleased to note that his entire testimony was republished in the hearing of this Committee on September 12, 1984.

Without doubt, there are individuals within our nation—perhaps even some in the Senate—who desire to subordinate the sovereignty of our nation, and that of all nations, to an international superstate, a "new world order" as it is frequently called. For them, ratification of the Genocide Convention would constitute a major advance toward such a goal. But they must not prevail if our nation is to retain its independence. Senate rejection of this dangerous treaty will put a brake on such nefarious designs.

I urge every Senator to vote against ratification of this treaty. A negative vote will preserve the independence of this nation and earn the deserved gratitude of the American people.

U.S. DEPARTMENT OF STATE
Washington, DC, May 21, 1985.

Hon. RICHARD G. LUGAR,
Chairman, Committee on Foreign Relations,
U.S. Senate.

DEAR MR. CHAIRMAN: Thank you for your letter of May 7 on the Genocide Convention. In that letter you asked us to provide the Administration's position on each of eight provisions in the attachment, which are proposed for inclusion in the resolution of advice and consent to ratification of the Genocide Convention, and to indicate whether we object to any of these provisions. This letter responds on behalf of the Secretary of State and the Attorney General.

The Administration, as the President indicated last September, is firmly committed to ratification of the Genocide Convention. Ratification will assist U.S. efforts to oppose the kind of gross human rights abuses that the Convention addresses. We have cooperated with the Committee in attempting to achieve this goal. As you indicate, the eight provisions were the subject of recent discussions between Committee staff, staffs of various members and representatives of the Departments of State and Justice. We appreciate the opportunity to have participated in these sessions and share your view that they were productive and resulted in the resolution of several difficulties.

We understand that, if the Foreign Relations Committee does not adopt these eight provisions, you see little prospect of success for the Convention during this Congress and that you personally would not be prepared to request floor time for the Convention or support Senate approval of it without these provisions. We have also noted your view that, if we do not take this opportunity to approve the Convention, the momentum needed to do so may never be recovered. Because of these factors, even though we have not proposed the adoption of several of these statements, we are prepared to accept your eight proposals in order to secure prompt Senate approval of the Convention.

We have not had previously an opportunity to comment on one element of the constitutional reservation which has been added subsequent to the staff discussions, the final phrase "as determined by the United States". There is a long history to this phrase in the context of the so-called Connally Reservation to U.S. acceptance of the World Court's compulsory jurisdiction that has sparked considerable controversy over the years. We would urge the Committee to eliminate that phrase in the proposed reservation because we consider it both unnecessary and counterproductive in the context of the Genocide Convention. Its deletion would not increase the risk of incorrect interpretations of the U.S. Constitution or the Convention, whereas its presence might invite such misinterpretation.

We are encouraged by the Committee's efforts to complete action on the Genocide Convention and to report it favorably to the full Senate. As you know, the Genocide Convention has been under consideration in this country for some 37 years, and its adoption has been urged by six Presidents. Your efforts and those of the Committee strongly enhance the possibility that President Reagan will have the opportunity finally to ratify the Convention, thereby concretely expressing this country's vehement condemnation of those who would engage in the inhumanity of genocide. We stand ready to continue to work with the Committee to achieve this goal.

Sincerely,

WILLIAM L. BALL III,
Assistant Secretary, Legislative and Intergovernmental Affairs.

LUGAR/HELMS PROVISOS AS APPROVED BY FOREIGN RELATIONS COMMITTEE

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the International Convention on the Prevention and Punishment of the Crime of Genocide, adopted unanimously by the General Assembly of the United Nations in Paris on December 9, 1948 (Executive O, Eighty-first Congress, first session), Provided that—

I. The Senate's advice and consent is subject to the following reservations:

(1) That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

(2) That nothing in the Convention requires or authorizes legislation or other action by the United States or America prohibited by the Constitution of the United States as interpreted by the United States.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) That the term "intent to destroy, in whole or in part, a national, ethical, racial, or religious group as such" appearing in Article II means the specific intent to destroy, in whole or in substantial part, a national, ethnical, racial, or religious group as such by the acts specified in Article II.

(2) That the term "mental harm" in Article II(b) means permanent impairment of mental faculties through drugs, torture, or similar techniques.

(3) That the pledge to grant extradition in accordance with a state's laws and treaties in force found in Article VII extends only to acts which are criminal under the laws of both the requesting and the requested state and nothing in Article VI affects the rights of any state to bring to trial before its own tribunals any of its nationals for acts committed outside a state.

(4) That acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide as defined by this Convention.

(5) That with regard to the reference to an international penal tribunal in Article VI of the Convention, the United States declares that it reserves the right to effect its participation in any such tribunal by a treaty entered into specifically for that purpose with the advice and consent of the Senate.

III. The Senate's advice and consent is subject to the following declaration:

That the President will not deposit the instrument of ratification until after the implementing legislation referred to in Article V has been enacted.

○